

THE CONSTRUCTION OF RESPONSIBILITY IN THE CRIMINAL LAW

RICHARD C. BOLDT†

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† Assistant Professor of Law, University of Maryland School of Law. J.D., Yale Law School, 1982; A.B., Columbia College, 1979. Many friends and colleagues have provided me with invaluable assistance and encouragement in the preparation of this article, including Barbara Bezdek, David Bogen, John Brumbaugh, Karen Czapanskiy, Theresa Glennon, Phyllis Goldfarb, Homer LaRue, Howard Lesnick, Judith Lichtenberg, David Luban, Kendall Thomas, Edward Tomlinson, and Gordon Young. In addition, I owe a special debt of gratitude to Marc Feldman and George Thomas for their kindness, clear thinking, and keen insights.

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INTRODUCTION

All human behavior can be understood from two perspectives. The first, which can be thought of as objective in nature, holds that conduct is always the product of some matrix of causal factors that necessarily determines choice.¹ The second, which one writer has labeled the “participant” perspective,² regards the great bulk of human activity as having been produced through the agency of an individual’s free will.³ It is this second perspective that is generally given voice in the criminal law.

¹ Generally, this article will refer to this perspective as “determinism.” Mark Kelman has provided a useful definition of determinist discourse in suggesting that it “pictures conduct in structuralist, backward-regarding, amoral terms, holding that conduct is simply a last event we focus on in a chain of connected events so predetermined as to merit neither respect nor condemnation.” MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 86 (1987) [hereinafter KELMAN, GUIDE TO CLS]; see also Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) [hereinafter Kelman, *Interpretive Construction*] (examining doctrinal arguments in the substantive criminal law).

The determinist perspective can be thought of as “objective” in the sense that it is a “theoretical construct which fits the observed data” regarding the actual origins of human behavior. Robert P. Knight, *Determinism, “Freedom,” and Psychotherapy*, 9 PSYCHIATRY 251, 255 (1946). Free choice, by contrast, involves the “subjective psychological experience” by which notions of intentionalism are attributed to an individual actor. *Id.*

² See P.F. STRAWSON, SKEPTICISM AND NATURALISM: SOME VARIETIES 38 (1985) [hereinafter STRAWSON, SKEPTICISM AND NATURALISM]; P.F. STRAWSON, *Freedom and Resentment* [hereinafter STRAWSON, *Freedom and Resentment*], in FREEDOM AND RESENTMENT 1, 1-25 (1974).

³ Generally, this perspective will be referred to here as “intentionalism.” Kelman explains that intentionalist discourse “pictures human action in phenomenological, forward-looking, free-will-oriented terms, emphasizing the indeterminacy of action and, correlatively, the ethical responsibilities of actors.” KELMAN, GUIDE TO CLS, *supra* note 1, at 86.

Considerable scholarly attention has been paid to these competing perspectives and to the ways in which criminal law doctrine reflects an ongoing tension between them.⁴ Some of this scholarship has addressed directly the special problems posed by chemically-dependent⁵ offenders, since both perspectives can so plausibly explain alcoholic or addictive behavior.⁶ In fact, a careful study of the criminal law's treatment of chemical dependency forces to the surface this essential tension and creates an unusual opportunity to consider fundamental questions of human personality and action.

The thesis of this article is that the criminal law—indeed, the legal system generally—does more than simply express an intentionalist perspective. Rather, it is a vital societal mechanism by which that perspective is created and maintained, and the causal or objective perspective obscured.

A key element in this construction⁷ of individual responsibility,

⁴ See, e.g., KELMAN, GUIDE TO CLS, *supra* note 1 (summarizing and assessing CLS writings on law); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985) (presenting competing theories of punishment); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986) (discussing the "causal theory of excuse").

⁵ There is considerable terminological confusion surrounding alcoholism and drug addiction. See generally MARK KELLER ET AL., A DICTIONARY OF WORDS ABOUT ALCOHOL 6-27 (2d ed. 1982) (defining terms used to describe addiction and types of alcoholism); Aubrey Lewis, *Introduction: Definitions and Perspectives*, in SCIENTIFIC BASIS OF DRUG DEPENDENCE 5, 5-11 (Hannah Steinberg ed., 1969) (discussing the meaning of "drug dependence"). Most professionals who work in the treatment field now speak of alcoholism and drug addiction in terms of substance abuse or chemical dependence. See, e.g., Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 421 n.42 (1975) (listing sources reviewing the definitional inadequacies of the term "addiction"). This article will follow that practice.

⁶ Examples include Fingarette, *supra* note 5, at 417-27; Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045 (1944); Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393 (1988); see also GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 846-47 (1978) (comparing differing views of the legal effect of intoxication in various countries); Kelman, *Interpretive Construction*, *supra* note 1, at 600-03 (examining the "status versus conduct distinction" in the criminal law); Moore, *supra* note 4, at 1103 (explaining the distinction between the legal defenses of addiction and intoxication).

⁷ The choice of the word "construction" here is quite deliberate, and is meant to suggest what David Trubek has termed a "very strong 'cultural' view of social relations, one in which society is in some real sense 'constituted' by systems of meaning." David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 599 (1984). This way of thinking about social institutions draws heavily upon the work of Louis Althusser, who has shown that some institutions "produce" ideology while others simply "transmit" ways of understanding the world. See Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the*

and a key feature of excuse theory generally, is the criminal law's rather stylized treatment of the human capacity for practical reasoning.⁸ As a theoretical matter, it is fair to assert that the process of practical reasoning, through which alternative courses of conduct are weighed and decisions reached, is itself, in every instance, fully determined by factors beyond the autonomous control of the actor.⁹ At the same time, conduct which results from this sort of cognitive work does seem to belong to the human actor. It is in this respect that conduct can be simultaneously described as determined and free.

For purposes of figuring criminal responsibility, however, a dualist conception of conduct will not suffice. If the actor can be said to have engaged in a process of practical reasoning, responsibility ordinarily will be assigned and the matrix of causal factors that shaped that reasoning process will, along the way, be obscured. If, on the other hand, the actor was unable in a meaningful fashion to engage in the cognitive enterprise essential to decision making, it is likely that responsibility will not be assigned and the deterministic roots of his or her conduct will remain visible.

Because both an intentionalist and a determinist account can readily be applied to the behavior of chemically-dependent actors, the treatment that courts have accorded the occasional requests for recognition of a loss-of-control excuse¹⁰ offers an unusual oppor-

Concept of Ideology to the Analysis of Law, 19 LAW & SOC'Y REV. 11, 18 (1985) (discussing LOUIS ALTHUSSER, *Ideology and the Ideological State Apparatuses*, in LENIN AND PHILOSOPHY (Ben Brewster trans., 1971)). For an anthropological view of the "constructional role of law," see CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE First Page, 230-31 (1983).

⁸ The writer who has most clearly articulated the theoretical links between practical reasoning and individual responsibility is Michael Moore. See Moore, *supra* note 4; see also MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP chs. 1 & 2 (1984) (explaining that the idea of practical reason is a central concept in our "understanding of ourselves" and "the legal view of persons"); *infra* text accompanying notes 69-79.

⁹ See, e.g., John Hospers, *What Means This Freedom?*, in FREE WILL AND DETERMINISM 26, 32 (Bernard Berofsky ed., 1966) (considering whether, in the final analysis, we are "responsible for any of our actions at all"); see also *infra* notes 107-108 and accompanying text.

¹⁰ As a doctrinal matter, chemically-dependent criminal defendants have raised a variety of defenses over the years, variously styled as affirmative defenses or as missing-element defenses. For a useful discussion of criminal law defenses generally, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982). The affirmative defenses have included claims of insanity, duress and the like, while the missing-element defenses have implicated the voluntary act and mens rea requirements. See Nemerson, *supra* note 6, at 419-31. The "loss-of-control" excuse

tunity to study the criminal law's ideological¹¹ functioning. At one level, it is probably accurate to say that chemically-dependent offenders regularly have been held criminally responsible for conduct such as possession of narcotics, despite their claims that such conduct is the result of a compulsion beyond their control, because they have failed to convince courts that they are disabled from engaging in a process of practical reasoning. At a deeper level, the failure of these exculpatory claims represents a recognition that acceptance of a loss-of-control defense for addicts and

cuts across many of these divides, and has drawn its strength from claims that volition or free will is essential both to the voluntary act requirement and the *mens rea* requirement present at common law. See WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *HANDBOOK ON CRIMINAL LAW* 349-51 (1972). In addition, the "causal theory" of excuse, which is premised upon the notion that an actor whose conduct was "caused" by some nonautonomous force is not criminally responsible, see Moore, *supra* note 4, at 1091, has provided a basis for the assertion of an affirmative defense by some chemically-dependent defendants, see Kent Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas, 69 COLUM. L. REV. 927, 935-45 (1969). What all of these formulations share, of course, is the basic premise that conduct that is not the result of the unfettered volition of the defendant is not culpable. See *infra* notes 157-161 and accompanying text.

¹¹ On ideology and legal institutions generally, see Hunt, *supra* note 7.

The concept of ideology has been employed in a variety of different ways. At one extreme stands the work of Karl Mannheim, for whom ideology meant the "characteristics and composition of the total structure of the mind," or the *weltanschauung* of the subject. KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 49-50 (Louis Wirth & Edward Shils trans., 1936). Mannheim suggested that "opinions, statements, propositions, and systems of ideas . . . [should not be] taken at their face value but . . . [should be] interpreted in the light of the life-situation of the one who expresses them." *Id.* at 50. At the other extreme lies the work of those who understand ideology as the complex of ideas that supports and serves the interests of dominant classes. See generally JOHN B. THOMPSON, *STUDIES IN THE THEORY OF IDEOLOGY* 4 (1984) (arguing for and defending a *critical conception* of ideology, in which ideology is "linked to . . . the process of maintaining domination").

The concept of ideology employed in this article is close to that set out by commentator Carol Greenhouse: "[L]egal ideologies and ideologies in general involve conventionalized invocations of norms and rules that simultaneously suggest and eliminate competing ideologies by elaborating locally significant categories of meaning. Ideologies represent strategic claims concerning the nature of normative orders." Carol J. Greenhouse, *Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies*, 22 LAW & SOC'Y REV. 687, 689 (1988).

The assertion that there is an ideological function embedded within our criminal law blaming practices relies heavily upon the view that those practices involve the manipulation of meaning through language. As one author has explained it: "Ideology is inscribed in signifying practices—in discourses, myths, presentations, and representations of the way 'things' 'are'—and to this extent it is inscribed in the language." CATHERINE BELSEY, *CRITICAL PRACTICE* 42 (1980).

For a fuller discussion of the ideological functioning of the criminal law, see *infra* text accompanying notes 124-144.

alcoholics could fundamentally undermine the system's capacity to articulate an ideology of individual responsibility.

Perhaps the most elaborate working out of the tension between intentionalism and determinism as a substantive criminal law matter occurred in 1973, when the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, decided *United States v. Moore*.¹² The defendant in this case had appealed his conviction for possession of heroin on the grounds that, because he was an addict "with an overpowering need to use heroin," he should not have been held criminally responsible.¹³ Essentially, Moore's claim of nonresponsibility was founded upon a deep strain within Western jurisprudence that holds that conduct is blameworthy only when it is the product of the actor's free will.¹⁴ At the same time, Moore's account of his heroin addiction and its effect on his capacity to exercise free choice was a specific example of a general determinist view of human behavior that carries the potential to undermine the ascription of responsibility whenever a person has acted.¹⁵ While Moore's appeal was unsuccessful, it provoked a judicial conversation of uncommon erudition, by a court of national stature, regarding this fundamental tension within the criminal law.

The *Moore* opinions are deserving of careful analysis despite the fact that the case is nearly twenty years old. The insight that such an analysis yields has a direct bearing on current controversies involving the use of the criminal law to fight a "war on drugs."¹⁶

¹² 486 F.2d 1139 (D.C. Cir.) (en banc), *cert. denied*, 414 U.S. 980 (1973).

¹³ As Judge Wilkey put it: "The gist of appellant's argument here is that the common law has long held that the capacity to control behavior is a prerequisite for criminal responsibility." *Moore*, 486 F.2d at 1145 (citation omitted).

¹⁴ See, e.g., JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 166-67 (1947) ("[O]ur criminal law rests precisely upon the same foundation as does our traditional ethics: human beings are 'responsible' for their volitional conduct."). As H.L.A. Hart has expressed the idea: "[A] fundamental principle of morality [is] that a person is not to be blamed for what he has done if he could not help doing it." H.L.A. HART, *Punishment and the Elimination of Responsibility*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 168, 174 (1968). At an experiential level, this "principle of responsibility," Moore, *supra* note 4, at 1111-12, seems almost axiomatic; it is commonplace for all of us to request and grant excuses as a consequence of accounts such as, "I couldn't help being late, I was caught in a traffic jam." Michael Moore has termed this the "causal theory" of excuse. See *id.*

¹⁵ On the problem of determinism's incompatibility with traditional notions of individual responsibility, see Weinreb, *supra* note 4, at 57-61.

¹⁶ For a helpful discussion of the "war on drugs," see John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991); see also U.S. OFFICE OF NAT'L DRUG CONTROL POLICY, *NATIONAL DRUG CONTROL STRATEGY* 1 (1990) [hereinafter

Despite strong claims on the part of those who have pressed for a loss-of-control defense that addiction is a disease, the court in the *Moore* case, like other courts facing similar claims, refused to create a new excuse, because to do so would have undermined the criminal law's capacity to articulate a compelling intentionalist account of human behavior. That account, in turn, is a central feature of our normative landscape.

Ironically, although the threat to the ideological functioning of the criminal law posed by cases like *Moore* was met squarely and resolved when posed as a question of substantive doctrine, it has resurfaced more recently as the operational consequence of efforts to employ a criminal law enforcement strategy to combat drug and alcohol abuse. This strategy has resulted in a massive increase in the volume of cases within the system.¹⁷ Moreover, the vast majority of these additional drug- and alcohol-related cases involve defendants drawn from distinct, subordinated populations.¹⁸ The combination of these two developments has led increasingly to a new style of adjudication. Currently, in many criminal courts around the country, the individualized accounts central to an intentionalist ideology are being replaced by a group-based orientation that has introduced a new, potentially destructive form of determinism into the system.

Individualized adjudications make possible the attribution of responsibility on the basis of a defendant's freely chosen conduct. Group-based adjudications hold defendants responsible for who they are rather than for what they have done. Accounts of the first type are significant moments in the normative life of the community, because they assist us in managing the intentionalist/determinist tension that inheres in all human behavior. Narratives of the latter variety also carry important moral weight. Unfortunately, however, because they tend to convey the message that defendants are blameworthy due to their racial and class characteristics, these accounts form the normative basis for the systematic exclusion of

NATIONAL DRUG CONTROL STRATEGY] (outlining the "policy of the United States to disrupt, to dismantle, and ultimately to destroy the illegal market for drugs by attacking both the supply and demand sides of the drug problem").

¹⁷ See generally Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCI. 939 (1989) (documenting this increase and arguing for serious consideration of "drug legalization" in light of the proven inability of the criminal justice system to curtail drug abuse).

¹⁸ See Powell & Hershenov, *supra* note 16, at 611.

whole groups from the social and economic functioning of the community.

Part I of this article examines formal blaming within the criminal law as ideological practice. This form of analysis is undertaken at length because it provides a vocabulary and a conceptual framework for the subsequent consideration, in Part II, of how criminal responsibility is assigned and excuses granted or denied, and in Part III, of how the criminal justice system ought to be deployed as a mechanism for social control. The problem of chemically-dependent offenders is raised throughout the article in order to create a window through which to view the larger institutional role of the criminal law.

The analysis begins with a description of the lurking tension between intentionalism and determinism that has long interested criminal law scholars. To appreciate fully this theoretical conundrum, the article offers one account of the longstanding philosophical debate over the compatibility or incompatibility of free will and universal causation.

Next, the article sets out the work of one scholar who has sought to reduce the opposed pull of intentionalism and determinism by arguing for the moral significance of practical reasoning.¹⁹ Despite the intellectual force of this theory of responsibility, the article argues that there is an uneasy fit between theoretical views that urge the predominant moral significance of cognitive activity on the one hand, and our everyday practice of assigning blame and granting excuses on the other. The first part concludes by suggesting that it is important to distinguish between theories of responsibility and our everyday experience in making moral attributions because doing so makes it possible to unmask an essential coexistence of intentionalism and determinism which is otherwise obscured through the ideological functioning of the criminal law.

Part II of the article then takes up directly the problem of chemically-dependent offenders. It begins with a close reading of the various opinions in the *Moore* case, and examines the shifting arguments pertaining to volition and excuse presented there. Competing models of addiction, which correspond in a rough fashion to competing theories of responsibility more generally, are then presented in order to illustrate the fundamental incompatibility of medical and legal notions of human behavior.

¹⁹ See Moore, *supra* note 4.

Essentially, the legal system manages the intentionalism/determinism conflict by submerging the causal roots of conduct in a thoroughgoing intentionalist account. The medical profession, on the other hand, is governed largely by the determinist perspective. Given this important difference in function and perspective, this article argues that, once the question is framed in terms of whether chemically-dependent actors should be *excused* from criminal responsibility, the legal system is bound to construct an intentionalist account that holds individual addicts and alcoholics responsible for their choices.

Part III of the article concludes the analysis by suggesting that a better strategy for those concerned about chemical dependency, as well as those concerned about preserving the integrity of the criminal justice system, would be to emphasize the public health aspects of the addiction problem, thereby placing it within an institutional setting dominated by a determinist ideology. This proposal to seek a recharacterization of drug and alcohol addiction as a medical problem represents a shift in the discussion from questions of liability to questions of criminalization.

It has become established tradition among criminal law theorists to separate out the process of defining the scope of the criminal law (criminalization) from the process of defining the essential characteristics of criminal responsibility (the general part).²⁰ Among those who have urged that certain traditionally criminal offenses be excluded from the criminal code, a series of common arguments has been raised. These arguments go beyond a consideration of individual defendants' blameworthiness—which is deemed to be relevant to questions of responsibility rather than criminalization—and instead focus on problems with respect to enforcement, discrimination, misallocation of resources, and system legitimacy.²¹

This article will show that the current policy of relying upon criminal law enforcement as the primary means for dealing with substance abuse has been largely ineffective. Moreover, the costs to

²⁰ See, e.g., FLETCHER, *supra* note 6, at 393 ("[T]he quest of Western legal theory for the last hundred years or so has been the cultivation of a general part of the criminal law. The general part goes beyond the particular offenses and even particular patterns of liability. . . ."). On the question of criminalization, see HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967).

²¹ For a critique of this sort of analysis, see John M. Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A. L. REV. 697 (1972).

the criminal justice system and to its constructional²² role have been enormous. As a matter of theory and as a matter of concrete necessity, the time has come to recognize the limitations of a policy of criminal enforcement. In the short run, a revised policy of partial decriminalization will serve the interests of those suffering from drug and alcohol addiction, as well as those who are indirect victims of this complex societal problem. In the long run, renewed attention to the matter of criminalization may well be necessary for the preservation of the criminal law as an effective ideological institution.

I. INTENTIONALISM AND DETERMINISM

Efforts to understand the relationship between free will and determinism for purposes of figuring an actor's moral responsibility have preoccupied a diverse group of thinkers from Plato and St. Augustine to Martin Luther and David Hume.²³ In this century, philosophers of the mind have conducted an especially vigorous debate on the question of whether a principle of responsibility that requires freedom of the will can be understood as compatible with notions of determinism.

In important respects, the debate can be framed as a definitional dispute centering on the term "freedom." Traditionally, an actor has been said to have acted freely (according to his or her free will) if, with respect to a given act, he or she could have done otherwise.²⁴ This traditional formulation has been challenged, however, by the use of a fairly standard set of hypotheticals designed to show that freedom of action may exist without freedom of choice and freedom of choice may exist without freedom of action. Thus, a person could determine to raise his or her arm, yet be incapable of translating that desire or choice into conduct because of physical paralysis or the application of a greater contrary physical force by others who wish the bodily movement not to occur.²⁵ Conversely,

²² See *supra* note 7.

²³ See PLATO, PHAEDRUS (Walter Hamilton trans., 1973); SAINT AUGUSTINE, THE CITY OF GOD 156-58 (Marcus Dods trans., 1950); MARTIN LUTHER, *On the Bondage of the Will*, in LUTHER AND ERASMUS: FREE WILL AND SALVATION 101 (E. Gordon Rupp & Philip S. Watson trans. & eds., 1969); DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING 91 (Charles W. Hendel ed., 1955).

²⁴ See John M. Fischer, *Introduction: Responsibility and Freedom*, in MORAL RESPONSIBILITY 9, 41 (John M. Fischer ed., 1986). The same analysis applies as well to omissions.

²⁵ See *id.* at 45.

a person could be fully capable, in the physical sense, of boarding an airplane, yet be incapable of so doing because of an overwhelming fear of flying.²⁶

Given that the "freedom to do otherwise" can be understood to include both the freedom to choose from among competing courses of conduct and the freedom to translate that determination into action, some writers have argued that both senses of freedom are required before an ascription of responsibility can be made.²⁷ Others have suggested that freedom of action alone is a sufficient basis for responsibility even if the actor's choice is in some respects determined or caused. These philosophers, most notably represented by David Hume and his intellectual heirs, have argued that the freedom that is morally significant is the freedom to act according to "one's own desires, . . . those which have their origin in the regularity of one's character"²⁸ According to this school, an actor is subject to praise or blame for his or her conduct to the extent that it "reflects on the sort of person he [or she] is," without regard for how he or she got that way.²⁹

Proponents of this view draw a critical distinction between "prescriptive" and "descriptive" versions of the determinist account. Both versions define determinism as the thesis that past events combine with the laws of nature to determine, or cause, a unique future.³⁰ The descriptive version favored by Humean writers such as Moritz Schlick, however, denies that such laws "compel" human behavior in any morally significant sense; rather, it is argued, they merely describe how that behavior comes about. This distinction between the prescriptive form of determinism (compulsion) and the descriptive variety (causation) is important because it makes it possible to hold human actors responsible for their conduct without regard to whether their choices were caused by factors beyond their

²⁶ See *id.* at 17.

²⁷ See, e.g., C.A. Campbell, *Is "Freewill" a Pseudo-Problem?*, in *FREE WILL AND DETERMINISM*, *supra* note 9, at 112, 125.

²⁸ Moritz Schlick, *When Is A Man Responsible?*, in *FREE WILL AND DETERMINISM*, *supra* note 9, at 54, 62; see also HUME, *supra* note 23, at 107 ("Actions are, by their very nature, temporary and perishing; and where they proceed not from some cause in the character and disposition of the person who performed them, they can neither redound to his honor if good, nor infamy if evil.").

²⁹ George Vuoso, Note, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661, 1673 (1987).

³⁰ See Peter Van Inwagen, *The Incompatibility of Responsibility and Determinism*, in *MORAL RESPONSIBILITY*, *supra* note 24, at 241, 242.

control.³¹ For purposes of figuring moral responsibility, the relevant question is whether an actor is the author of his or her own conduct such that his or her choices fairly can be attributed to his or her ongoing character. The arguably separate question of how the actor came to acquire such a character is said simply to be beside the point.³²

Critics of the Humean approach argue that its definition of freedom is incompatible with the central requirement of moral responsibility: that the person could have acted otherwise than he or she did.³³ This critique is significant because it implicates what one writer has called the "principle of transfer of powerlessness," which holds that "if you cannot prevent one thing, and you cannot prevent that thing's leading to another, you cannot prevent the other."³⁴ Acceptance of this principle undermines the Humean character-based approach to responsibility because the determined nature of human choice must also render unfree the conduct to which unfree choices lead. As John Hospers has put it: "How can anyone be responsible for his actions, since they grow out of his character, which is shaped and molded and made what it is by influences—some hereditary, but most of them stemming from early parental environment—that were not of his own making or choosing?"³⁵

A. *Individual Responsibility and the Process of Reflection*

A more thorough reworking of the principle of responsibility has been offered by another group of philosophers, who construct elaborate schemata of the human decision-making process in order to provide a more detailed defense of attributing determined choices to the person of the agent when assigning praise and blame. A feature common to most of these accounts is that they distinguish between the instinctive or motivational components of the decision-making process on the one hand, and the reflective or valuational elements on the other.³⁶

³¹ See Schlick, *supra* note 28, at 57-61.

³² See Vuoso, *supra* note 29, at 1681.

³³ See Campbell, *supra* note 27, at 113. A Humean might respond that an actor can act otherwise, if he or she chooses, but that it is a separate question whether he or she has the ability to so choose. See, e.g., Schlick, *supra* note 28, at 62-63 (analyzing the "consciousness of responsibility").

³⁴ Fischer, *supra* note 24, at 19.

³⁵ Hospers, *supra* note 9, at 32.

³⁶ Or, to state the distinction differently, between desiring and preferring.

A classic statement of this distinction was offered some years ago by Harry Frankfurt, who argued as follows: (1) Human beings, like most other animals, have desires and motives, and are able to make choices that frequently satisfy these "first-order desires."³⁷ (2) Human beings also have the capacity to form "second-order desires," or preferences among their first-order desires. Thus, a person who is addicted to drugs may have competing first-order desires to ingest the addictive substance and to refrain from so doing. In addition, says Frankfurt, he or she may have a second-order desire that favors abstinence over ingestion.³⁸ (3) The characteristic that distinguishes persons from nonpersons is that persons frequently are able to make their second-order desires the basis upon which they *wish* to be moved to action. In Frankfurt's terminology, the essential attribute of personhood is the presence of these "second-order volitions," which occur when the individual "wants . . . certain desire[s] to be his will."³⁹ Thus, with respect to the hypothetical addict, if he or she has the capacity to prefer the desire to abstain over the competing desire to ingest, and if this preference is the addict's "will" (if he or she wishes to act in conformity with this second-order preference), then, even if he or she is unable to resist the first-order desire to ingest, he or she is still possessed of the essential attribute of personhood. (4) "Freedom of the will" exists when a person is able to form a second-order volition as to *any* of his or her first-order desires.⁴⁰ (5) Moral responsibility does not require freedom of the will; rather, all that is required is the ability to "act freely," or the ability to act according to one's second-order volition.⁴¹

Interestingly, Frankfurt makes no claim with respect to the moral content (as opposed to the moral significance) of second-order volitional processes. While he asserts that the chief characteristic of persons, as opposed to objects, animals, and "wantons," is

³⁷ See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in MORAL RESPONSIBILITY, *supra* note 24, at 65, 66-67. Thus, when a person is thirsty, he or she can decide to drink some water.

³⁸ See *id.* at 70-72. A person may also have desires of the third, fourth, or n-th order. See *id.* at 76.

³⁹ *Id.* at 70. "The essential characteristic of a wanton [a nonperson] is that he does not care about his will. His desires move him to do certain things, without its being true of him either that he wants to be moved by those desires or that he prefers to be moved by other desires." *Id.* at 71.

⁴⁰ Frankfurt calls this the freedom "to will what [one] wants to will, or to have the will [one] wants." *Id.* at 75.

⁴¹ See *id.* at 78-79.

the capacity for self-reflection,⁴² he does not draw an essential equivalence between reflection and valuation. He describes second-order volitions as integrated preferences relating to competing first-order desires, but he refuses to take the additional step of claiming that those preferences necessarily result from a particular "moral stance" assumed by the individual.⁴³

Gary Watson has offered an alternative version of Frankfurt's model which does distinguish between "wanting" and "valuing."⁴⁴ Like Frankfurt, Watson seeks to construct an analytic scheme that identifies the particular variety of "freedom" upon which he believes responsibility ought to rest. Where the two writers part is in their description of the reflective activity by which preferences are formed. Watson's claim is that "the rational part of the soul itself determines what has *value* and how much, and thus is responsible for the original ranking of alternative states of affairs."⁴⁵ In Watson's schema, an actor's responsibility turns on the interplay between his or her "motivational system" (the set of passions, instincts, and desires which incline an agent toward or away from some course of action) and "valuational system" ("that set of considerations which . . . yields judgments of the form: the thing for me to do in these circumstances, all things considered, is *a*").⁴⁶

The problem of assigning moral responsibility under Watson's analysis arises because what an agent desires may be different from that which he or she values, and that which he or she values most may be other than what he or she ultimately is moved to seek.⁴⁷ The relative influence on one's behavior of his or her motivational system versus his or her valual system presumably varies from one decisional moment to the next. Watson argues that conduct that is governed entirely by desire or emotion, and which is "radically independent of the evaluative systems of . . . agents," is unfree because it is of a "compulsive character"; thus, in his view,

⁴² See *id.* at 67.

⁴³ "It may not be from the point of view of morality that the person evaluates his first-order desires." *Id.* at 73 n.6.

⁴⁴ See Gary Watson, *Free Agency*, in *MORAL RESPONSIBILITY*, *supra* note 24, at 81, 82.

⁴⁵ *Id.* at 84. Watson attributes this idea to Plato. *Id.*

⁴⁶ *Id.* at 91.

⁴⁷ See *id.* at 85. Watson does concede the fairly obvious point that valuations influence desires, see *id.* at 84, and that desires influence valuations, see *id.* at 89. All the same, he seems correct in asserting that the two diverge from time to time, and that these instances are the ones in which assignments of responsibility are most difficult.

the conduct of "kleptomaniacs, dipsomaniacs, and the like" should not result in the ascription of responsibility.⁴⁸

In the more typical case, however, human beings are said to be "more or less free agents," depending upon the degree of divergence between their appetites or passions and their valuational judgments. As the divergence between an actor's wants and values grows (with respect to a given instance of conduct), responsibility lessens; as the two systems converge, responsibility increases.⁴⁹

What Frankfurt and Watson are after, of course, is a conception of responsibility that can be made compatible with the determinists' account of human behavior.⁵⁰ The ascription of responsibility to an individual actor is analytically difficult because desert is understood as personal; there must be some attribute unique to an actor that renders him or her an appropriate subject for praise or blame.⁵¹ If one focuses on the determined nature of choices and actions, the requisite personal autonomy may be undermined because the matrix of causal factors that determine an agent's conduct is likely to include elements external to his or her autonomous self. If, on the other hand, one focuses on internal reflective processes, which go to define the very essence of a person, a satisfactory foundation for desert may be said to exist.

In light of this distinction, Frankfurt and Watson attempt a revision of the responsibility principle traditionally relied upon by causal theorists. Both focus their analyses upon the reflective component of the decision-making process, thereby separating that component from the instinctive or motivational roots of behavior.⁵² If the capacity to reflect upon or evaluate one's own desires

⁴⁸ *Id.* at 96. It is worth noting the strong link between this point and Michael Moore's notion that some excuses are granted because the actor was denied the opportunity to engage in practical reasoning. *See infra* notes 69-79 and accompanying text.

⁴⁹ *See* Watson, *supra* note 44, at 95-96.

⁵⁰ Watson characterizes the project as one of setting out a conception of freedom that makes the determinists' account irrelevant. *See id.* at 82.

⁵¹ *Cf.* Weinreb, *supra* note 4, at 56-57 ("Unless the capacity to determine one's action is not merely individual but *personal* in a strong, constitutive sense, an attribution on the basis of how the capacity is exercised seems altogether arbitrary; for the attribution attaches to a particular person and not simply to a person or to any person.").

⁵² *Cf.* JAMES FITZJAMES STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 169-72, 170 (1883) ("The man who controls himself refers to distant motives and general principles of conduct, and directs his conduct accordingly. The man who does not control himself is guided by the motives which immediately press upon his attention.").

is to be understood as a sufficient condition for the ascription of responsibility, however, such an ability must somehow be invested with a special moral significance. Frankfurt and Watson recognize this requirement, and both make claims aimed at satisfying it.

In Frankfurt's schema, the morally significant moment within the decision-making process occurs when the actor forms a volition of the second order or higher. For Frankfurt, the formation of such a volition signifies that the actor has "identifie[d] himself *decisively* with one of his first-order desires, [such that] this commitment 'resounds' throughout the potentially endless array of higher orders."⁵³

The claim implicit in Watson's work, by contrast, is that actors who produce conduct through the agency of an engaged valuational system "own" their choices in a true and morally significant fashion, precisely because the *content* of their reflective work is normative (valuations by reference to a set of norms that are internal and unique to the actor). In Watson's emendation of Frankfurt's scheme, the uniquely personal characteristic of the human self within the decisional process is identified as that mass of attitudes and values that provides reasons for one's actions.⁵⁴

The difference between these two approaches may be less important than the feature they share in common. As we have seen,

⁵³ Frankfurt, *supra* note 37, at 76. Although the actor may not be possessed of the freedom to will otherwise, he or she is deemed to be responsible for behavior animated by this volition, because he or she has made this particular desire his or her "own." *See id.*

Watson criticizes this aspect of Frankfurt's theory on the ground that nothing within his analysis explains why a particular want can have "the special property of being peculiarly . . . [the actor's] 'own.'" Watson, *supra* note 44, at 94. This criticism seems compelling, given that the significance that Frankfurt attaches to the formation of a volition of the second order or higher appears to be a matter of definition rather than analysis.

⁵⁴ At times Watson describes this value-driven reasoning process as "an original spring of action." *See, e.g.,* Watson, *supra* note 44, at 84. Humans are not free agents, he says, in the sense that God is, because, by definition, God's desires and evaluative preferences are always the same. Nevertheless, to the extent that people share with God the capacity to form preferences based upon a process of valuation, they possess a kind of autonomy or freedom which is unavailable to "the Brutes," and which is a sufficient moral basis upon which to attach responsibility. *See id.* at 96.

The opportunity and capacity for practical reasoning, which are central to Moore's revised theory of responsibility, also play an important role in Frankfurt and Watson's schemas. Nevertheless, while Frankfurt and Watson both understand practical reasoning to be a necessary condition for self-reflective activity, neither of them understands it as a sufficient condition. *See* Frankfurt, *supra* note 37, at 71; Watson, *supra* note 44, at 85.

the difficulty facing the causal theorist is that traditional principles of responsibility seem incompatible with the fairly plausible notion of universal causation. Some writers, in order to avoid the unhappy conclusion that a universal excuse exists, continue to insist that human choices and/or actions can be contra-causal.⁵⁵ Frankfurt and Watson, on the other hand, operate within an alternative philosophical tradition in which the relevant question is not whether conduct is caused, but rather whether the matrix of causation producing a given act includes some process of reflection or valuation that is internal to the agent. The premise that an agent "owns" his or her internal mental process renders the problem of universal causation irrelevant, as a conceptual matter, to the question of moral responsibility for conduct, because the freedom required under this alternative principle of responsibility is defined simply as the freedom to engage in self-reflective activity.

Significantly, given their definition of the problem, Frankfurt and Watson need not deny the truth of the principle of transfer of powerlessness.⁵⁶ Instead, they argue, albeit in slightly different terms, that behavior that is the product of an unbroken chain of prior causes is still attributable to the person of the human actor, so long as the filter of an autonomous mental process is in place.⁵⁷

This choice between competing versions of the responsibility principle, and competing notions of individual autonomy, is not capable of a final and conclusive resolution through the application of scientific proofs. A number of libertarian writers have recognized the limited capacity of objective analysis to settle the question of the existence of a contra-causal freedom of the will, and have appealed to their readers to resolve the question for themselves, based upon their own moral experience.⁵⁸

⁵⁵ Claims of this sort are advanced in Campbell, *supra* note 27, at 113; Roderick M. Chisholm, *The Agent As Cause*, in ACTION THEORY 199 (Myles Brand & Douglas Walton eds., 1976); Roderick M. Chisholm, *Freedom and Action*, in FREEDOM AND DETERMINISM 11 (Keith Lehrer ed., 1966).

⁵⁶ See *supra* note 34 and accompanying text.

⁵⁷ See Frankfurt, *supra* note 37, at 77-80; Watson, *supra* note 44, at 95-96; see also Bernard Gert & Timothy J. Duggan, *Free Will as the Ability to Will*, in MORAL RESPONSIBILITY, *supra* note 24, at 205, 206-07, 213 (arguing that the question whether a person has free will is "best viewed as a question about whether he has a certain power (. . . ability) not . . . whether what a man willed to do was the result of coercion").

⁵⁸ As C.A. Campbell has stated:

Certainly "logical analysis" *per se* will not do. That has a function, but a function that can only be ancillary. For what we are seeking to know is the

In a similar fashion, the claims of the Humeans regarding character, as well as those of Frankfurt and Watson with respect to self-evaluative mental process, are immune from measurement, objective study, or proof. To be sure, Frankfurt and Watson do attempt to convince their readers that it is the presence of reflective mental activity that distinguishes human decision makers from objects and other animals. As noted above, however, Frankfurt does little more than describe this uniquely human mental process and postulate its moral significance, while Watson relies on Platonic notions of the soul to carry his argument.⁵⁹

B. *Praising And Blaming As Social Practice*

One need not leave the matter to competing postulates, as it may be possible to gain some understanding of the qualities that make human actors responsible moral agents by investigating the social practices that form the context for shared ideas about blaming and praising.

Much of the work which has been undertaken concerning responsibility and desert can be located within the tradition of liberal individualism, in which human agents are presented as "pre-social" beings endowed with a rationality and autonomy independent from, though perhaps reflected in, the operation of social practice.⁶⁰ The traditional responsibility principle, which requires freedom of the will, ordinarily is treated within the confines of this liberal ideology.⁶¹ So too, the compatibilist alternatives, while recognizing the determined nature of human choices and actions,

meaning of the expression "could have acted otherwise" not *in the abstract*, but in the context of the question of man's *moral responsibility*

...

. . . We ought to place ourselves imaginatively at the standpoint of the agent engaged in the typical moral situation in which free will is claimed, and ask ourselves whether from this standpoint the claim in question does or does not have meaning for us.

Campbell, *supra* note 27, at 126, 132.

⁵⁹ See Frankfurt, *supra* note 37, at 66-67, 74-76; Watson, *supra* note 44, at 83-86.

⁶⁰ See NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 144-46 (1988). Among the more influential contributions to the development of this liberal tradition is JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1967).

⁶¹ See Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 1005-06 (1986); see also HART, *supra* note 14, at 11-13, 18-22 (noting how liberal ideology establishes the idea that criminal punishment is solely for those who voluntarily break the law).

share a presumption that the qualities which render a human actor responsible somehow reside outside the ambit of social process.⁶²

A competing school of thought has developed, however, that urges a consideration of collective social activity as a means of understanding common notions of individualism and individual responsibility. These communitarian critics of liberalism argue that humans are "to a large extent social and socially constructed beings," whose "very 'personhood' is influenced by the kind of society in which they live."⁶³ Ultimately, the notion of individual autonomy that renders humans fit subjects for what P.F. Strawson has called the "reactive attitudes"⁶⁴ must be understood in these socially-contextualized terms. Human autonomy exists because it is a social necessity and because people share the subjective experience of its operation, not because it can be shown to exist as some sort of pre-social reality.⁶⁵

⁶² See Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5, 7 (1982); LACEY, *supra* note 60, at 65-68.

⁶³ LACEY, *supra* note 60, at 144-45. Frank Alexander has suggested that contemporary jurisprudence generally is burdened by three "fallacies," one of which, the "ontological" fallacy, involves "the neglect of community as an essential source of meaning for life together." Frank S. Alexander, *Three Fallacies of Contemporary Jurisprudence*, 19 LOY. L.A. L. REV. 1, 2 (1985). Alexander goes on to argue that, "[w]hat is missing from contemporary jurisprudence is the possibility that the nature of being is *relational* rather than *individual*." *Id.* at 26. For other versions of communitarian theory, see ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 27-48 (1983); CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* 187-210 (1985); ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 29-144 (1975).

⁶⁴ STRAWSON, *SKEPTICISM AND NATURALISM*, *supra* note 2, at 38.

⁶⁵ For a good discussion of the "invented" nature of both group consciousness and individual autonomy, see Joseph S. Roucek, *SOCIAL CONTROL FOR THE 1980S: A HANDBOOK FOR ORDER IN A DEMOCRATIC SOCIETY* ix (Joseph S. Roucek ed., 1978) [hereinafter *SOCIAL CONTROL*]. On the issue of self consciousness and social practice, see UNGER, *supra* note 63, at 191-235.

Austin Sarat has observed that "consciousness and ideology" are terms that: embed the study of ideas in social structure and social relations. They draw attention to the way similarly situated persons come to see the world in similar ways. They suggest that subjectivity is not free floating and autonomous but is, instead, constituted, in a historically contingent manner, by the very objects of consciousness.

Austin Sarat, ". . . *The Law Is All Over*": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUMAN. 343, 344 n.1 (1990). This set of ideas is characteristic of those whose work grows out of the structuralism of Levi-Strauss. As Robert Gordon has put it: "The way human beings experience the world is by collectively building and maintaining systems of shared meanings that make it possible for us to interpret one another's words and actions." Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 281, 287 (David Kairys ed.,

Further complicating the matter is the fact that social practices relating to the attribution of responsibility involve multiple perspectives. As Professor Strawson has persuasively shown, people regularly see themselves and others from two competing vantage points: the "participant" and the "objective."⁶⁶ Employing the participant perspective, people unproblematically assign praise and blame to their own acts and the conduct of others, because they understand human agents as autonomous decision makers. At other times, through the lens of the objective standpoint, they refuse to ascribe responsibility, recognizing the nonautonomous history and circumstance which go to make up the determinist account.⁶⁷

In theory, both of these perspectives ought to be available for every instance of human activity. In practice, our experience tells us that only one perspective can operate at any given moment, if specific questions of responsibility and desert are to be resolved in a coherent fashion.⁶⁸

1. Theory Versus Practice

Ordinarily, the criminal law adopts Strawson's participant perspective when evaluating the responsibility of a given defendant; and yet, at times, the law recognizes excuses clearly animated by the objective viewpoint. The work of some contemporary criminal law theorists, by applying the thinking of Humean and Frankfurtean

1982). For an interesting attempt to reconfigure the relationship between absolute certainty and culture, see Joan C. Williams, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 VA. L. REV. 713 (1990).

⁶⁶ STRAWSON, SKEPTICISM AND NATURALISM, *supra* note 2, at 38; Strawson, *Freedom and Resentment*, *supra* note 2, at 1-25. In rough terms, the "participant" perspective is equivalent to the intentionalist perspective defined earlier. Similarly, the "objective" perspective corresponds to the determinist perspective. See *supra* notes 1 & 3.

⁶⁷ See Strawson, *Freedom and Resentment*, *supra* note 2, at 6-13.

⁶⁸ Strawson notes the "tension" that exists between these two perspectives. See *id.* at 10. This sort of tension has also been a theme in the work of Thomas Nagel. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 124 (1986).

Just as our world contains opposing views of human personality, so, too, we are constantly confronted with contesting notions of time. In Carol Greenhouse's fascinating study of the legal system's role in mediating such notions, she suggests that "the reformulation of time can be achieved only if the crucial differences among time's forms can be effectively suppressed." Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1637 (1989). Just so, the argument here is that a reformulation of individual autonomy can be achieved only if the crucial differences between the intentionalist and determinist perspectives can be effectively suppressed.

philosophers to questions of criminal responsibility and excuse, has helped to elucidate the operation of this shifting perspective. For example, in his article *Causation and the Excuses*,⁶⁹ Michael Moore argues that causal theories of excuse⁷⁰ should be rejected because they fail to account accurately for excuse doctrine as it exists within the criminal law,⁷¹ and because they fail to provide a sound

⁶⁹ See *supra* note 4.

⁷⁰ Moore describes the causal theory of excuse as follows:

[W]hen an agent is caused to act by a factor outside his control, he is excused; only those acts not caused by some factor external to his will are unexcused. The normative part of the theory asserts that the criminal law is morally right in excusing all those, and only those, whose actions are caused by factors outside their control.

Id. at 1091.

⁷¹ With respect to this claim, Moore examines a broad range of defenses founded upon factors such as compulsion, mental disability, and infancy in order to show that an impaired or underdeveloped capacity for "practical reasoning" rather than the simple absence of volition better explains the law's willingness to excuse certain conduct in particular circumstances. See Moore, *supra* note 4, at 1101-11. The causal theorist might argue, for example, that a defendant who has acted in response to another's threats of death or serious bodily injury is entitled under the law to a duress excuse upon a showing that his or her will was overborne, because the moving force behind the action (the true actor) is the third-party coercer rather than the defendant himself or herself. See *id.* at 1102 (citing as an example of this kind of reasoning the English case of *Regina v. Hudson*, 2 All E.R. 244, 246 (1971)). Moore responds that a better explanation of this established criminal law excuse is to be found in the fact that external threats by a third party exculpate a defendant only when there is sufficient evidence that the coercion disrupted the defendant's ability to weigh options and freely choose a course of action. This description, says Moore, is a superior theoretical formulation because it more fully accounts for all of the doctrinal features of the excuse of duress, including the usual requirement that the external threat be one that a "person of reasonable firmness" would not have been able to resist." *Id.* at 1132 (quoting MODEL PENAL CODE § 2.09(1) (1962)).

Turning his attention to the insanity defense, Moore acknowledges that some elements within this area of law show the influence of a causality-centered principle of responsibility. He points out that the *Brawner* formulation set forth in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), rests upon an inquiry into the causal relationship between mental illness and criminal conduct, and he allows that all of the recognized insanity tests require a causal link between mental disease or defect and the conduct for which an excuse is sought. See Moore, *supra* note 4, at 1109. Nevertheless, Moore argues that "[i]t is not because crazy people are caused to do what they do that they are excused; rather, crazy people are excused because they are crazy." *Id.* at 1137. What he means by this, of course, is that actors who are relieved of criminal responsibility due to mental disease or defect avoid the ascription of responsibility not because their illness has forced them to pull a trigger or wield a knife (which would be the equivalent of some sort of internal third-party coercer), but because their illness is understood as having clouded their thought processes and disrupted their ability to engage in practical reasoning. In essence, Moore's claim here, as elsewhere, is that the law provides an excuse in this category of cases because impaired practical reasoning ability has rendered these actors other than responsible

normative basis for blaming practices in general.⁷² In the place of a causal theory, Moore offers an account in which the role of practical reasoning is central to determining the proper relationship between intentionalist and determinist perspectives in the figuring of criminal responsibility.

Moore's thesis is that a causal theory of excuse cannot be reconciled as a matter of logic with the reality of determinism. The idea is presented as an argument *reductio ad absurdum*. First, Moore sets out the "determinist premise," that all human conduct is the product of causal forces beyond the actor's control. Second, he identifies what he terms "the moral version of the causal theory of excuse." This moral claim, which is a natural corollary of the principle of responsibility, requires that blame be withheld when conduct is caused by factors outside of the scope of an actor's free will. Next, Moore states a theory of punishment under which moral culpability is a necessary condition for legal liability. Finally, Moore concludes that the three preceding steps yield a "universal legal excuse"—no conduct can ever be legally punishable.⁷³

Of course, says Moore, we can avoid this absurd conclusion if we are willing to give up one of the premises upon which it rests. The most obvious candidate would seem to be the assertion of determinism, and Moore toys with that solution before concluding that such a course would require a metaphysics that is "implausible."⁷⁴ The remaining choices are either to relinquish any normative basis for our blaming practices or to give up the causal theory of excuse. Moore opts to focus upon the latter possibility. His claim is that one must look beyond simple causal accounts in order to identify those features that make human actors responsible moral agents. In essence, he asserts that it is the opportunity and ability to engage in practical reasoning that, in the ordinary case, renders one subject

moral agents. *See id.* at 1138-39.

Finally, as regards the excuse of infancy, Moore rejects in short order the causal account that infants generally are not held responsible for otherwise criminal conduct because they are not possessed of volition. It is difficult, explains Moore, to accept the conclusion that minors, as a group, are always coerced in their conduct; rather, it is far more descriptive of established doctrine to say that an absence of experience and autonomy make it difficult for children to consider alternatives, develop criteria for decision, and act according to some rational calculation of costs and benefits. *See id.* at 1111.

⁷² *See id.* at 1111-12, 1139-48.

⁷³ *Id.* at 1113.

⁷⁴ *Id.* at 1112.

to blame and praise, punishment and reward.⁷⁵ Nevertheless, his claim that a causal theory of excuse is inadequate to explain how the system comes to adopt one or the other viewpoint, and his concomitant assertion that the capacity and opportunity to engage in practical reasoning are determinative, are as immune from scientific proof and conclusive logical analysis as are the claims of his philosophical forerunners.⁷⁶

Recognizing this, Moore allows that his version of the responsibility principle must be established by reference to "the totality of our moral experience involving praise and blame."⁷⁷ He argues that people regularly assign praise and blame to conduct known to have been caused by forces beyond the control of the actor,⁷⁸ and he identifies other instances, in which responsibility is withheld, in terms which make the role of practical reasoning predominant.⁷⁹

All the same, Moore is left with a number of cases, which he describes as "a very isolated class of moral experience,"⁸⁰ in which the causal theory does seem to be the best explanation for our strong exculpatory impulses. In particular, Moore is forced to account for the sympathy many people feel toward offenders whose behavior is the result of what Richard Delgado has called a "rotten social background."⁸¹ With respect to these "atypical" cases,

⁷⁵ See *id.* at 1136, 1139-49.

⁷⁶ At least one commentator in this area has made the claim that logical analysis alone is sufficient to settle the question. "The argument against libertarianism that is based on our moral experience will simply degenerate into an argument about what our moral experience is or should be. The more definitive argument against it is a purely conceptual one, which demonstrates that libertarianism is an incoherent position." Vuoso, *supra* note 29, at 1669. While it may be true that libertarianism is conceptually "incoherent," it is also the case that claims made by this commentator with respect to the central role of "character" in figuring an actor's responsibility are also incoherent, at least insofar as the principle of transfer of powerlessness is concerned. See *supra* note 34 and accompanying text. At root, conceptual analysis will carry the argument only to the extent that basic assumptions about human nature, premised upon moral experience, are shared by writer and reader alike.

⁷⁷ Moore, *supra* note 4, at 1144.

⁷⁸ "Our moral life is built upon our praising or blaming people when they help a friend, tell a bad joke, create a work of art, or write a clear and truthful essay about the excuses—even though we know at least some of the factors that caused these actions." *Id.* at 1144-45.

⁷⁹ See *id.* at 1127-39.

⁸⁰ *Id.* at 1145.

⁸¹ *Id.* The merits of the "rotten social background" defense were the subject of a spirited exchange between Judge David Bazelon and Professor Stephen Morse. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); see also Richard Delgado, "Rotten Social Background": Should

Moore abandons his reliance on everyday moral experience and claims that the sympathy we feel toward socially deprived offenders, like the optical illusion of a straight stick appearing bent when immersed in water, is a distortion of the true principle of responsibility.⁸²

A closer examination of the data left unexplained by Moore's theory is warranted, as it provides an important insight into the relationship between our formal blaming practices and our common understanding of human nature. Presumably, Moore would agree with Strawson that, when evaluating the conduct of human actors, we must choose between the participant and objective viewpoints. The import of Moore's analysis seems to be that the choice is absolute: if the actor was possessed of the opportunity and capacity for practical reasoning, then he or she was a responsible agent; if the actor was denied the opportunity to reason or was incapable of so doing, then responsibility may not be assigned.

Under this analysis, if offenders with "rotten social backgrounds" meet the criteria for responsibility (which in Moore's terms they do), the feelings of sympathy which many people experience must be explained away—or "discount[ed]"⁸³—as being the result of improper factors. Thus, Moore suggests that such sympathy is suspect because it is asymmetrical: people rarely feel sympathy for offenders whose conduct was caused by a privileged upbringing.⁸⁴ In addition, he argues that our impulse toward an exculpatory response in these cases results from a false psychology perhaps derived from hidden feelings of self-loathing or guilt. Finally, he asserts that this sort of sympathy is elitist and morally suspect, because the refusal to judge others means we think them morally less significant than ourselves, reducing the other to something less than a full human being.⁸⁵

There is much that is compelling about Moore's analysis of the proposed "rotten social background" defense. Nevertheless, he

the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. J. 9 (1985).

⁸² See Moore, *supra* note 4, at 1145-46.

⁸³ *Id.* at 1146-47.

⁸⁴ But see Clarence S. Darrow, *Closing Argument For The Defense In The Leopold-Loeb Murder Trial*, in FAMOUS AMERICAN JURY SPEECHES 992 (Frederick C. Hicks ed., Fred B. Rothman & Co. 1990)(1925).

⁸⁵ See Moore, *supra* note 4, at 1146-47. For a similar view of the relationship between responsibility and respect for others as persons, see Herbert Morris, *Persons and Punishment*, in THEORIES OF PUNISHMENT 76 (Stanley E. Grupp ed., 1971).

ought not be allowed to deny so easily that portion of our experience that fails to comport with his revised principle of responsibility. His assertion that "the causal theorist's interpretation of the principle of responsibility is inconsistent with the mass of our judgments about where it is just to praise and blame,"⁸⁶ may be correct as an empirical matter,⁸⁷ but, at a deeper level, his account fails to accomplish all that he wishes for it. Just as it would be impossible to develop a permanent objectivity of viewpoint on the strength of the determinist claim alone, because theoretical conviction with respect to the caused nature of conduct simply is inadequate to extinguish our ongoing experience as members of a community in which the reactive attitudes are employed as "part of the general framework of human life,"⁸⁸ so too, it is unrealistic to expect that a tight and elegant theory of responsibility based upon the operation of practical reasoning can render irrelevant our deep contrary instincts, whatever their origins may be.⁸⁹

2. Dualism

An alternative analysis of this class of cases, which does not require that prevalent feelings of sympathy be consigned to the category of the extraneous, is to understand the offender with a "rotten social background" as simultaneously responsible and not responsible, because he or she is simultaneously free and not free to act autonomously. In some essential respect, we understand that these actors could not have "done otherwise," given the extreme

⁸⁶ Moore, *supra* note 4, at 1147.

⁸⁷ Weinreb, however, disagrees with Moore on this point, asserting that "[p]ervasively throughout other areas of our experience a causal explanation *does* count as sufficient." Weinreb, *supra* note 4, at 60 n.27.

⁸⁸ Strawson, *Freedom and Resentment*, *supra* note 2, at 13.

⁸⁹ Kelman's view is that "people simply oscillate uncomfortably between intentionalist and determinist accounts, with no discernible metaprinciple to discover which is appropriate to particular situations." KELMAN, GUIDE TO CLS, *supra* note 1, at 90-91. He asserts further that it is a "seriously wrongheaded assumption" to believe that "logical consistency" rather than "deeply felt" instincts governs our blaming and praising practices. *Id.* at 318 n.12. Strawson puts the idea this way:

[I]n philosophy, though it also is a theoretical study, we have to take account of the facts in *all* their bearings; we are not to suppose that we are required, or permitted, as philosophers, to regard ourselves, as human beings, as detached from the attitudes which, as scientists, we study with detachment.

Strawson, *Freedom and Resentment*, *supra* note 2, at 25; cf. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1777-79 (1987) (arguing for the inherent separateness of theory and practice).

social deprivation which has shaped their decision-making process. At the same time, we hold them responsible for their actions because we believe that they have exercised choice and have directed their conduct according to formed preferences. The critical fact about this alternative understanding is that both the determinist and intentionalist descriptions of the offender's conduct are in some fashion true.⁹⁰

Moore rejects this alternative as predicated on an illegitimate sort of "linguistic dualism,"⁹¹ a failure to recognize that behind the words "could not have done otherwise" lie two quite distinct concepts, one of which is relevant to the assignment of criminal responsibility and one of which is not. Moore's argument proceeds in two steps: First, he argues that, in general, the tradition of "ordinary-language" philosophy upon which the dualist approach rests is theoretically unsound, at least where established social practice is at odds with new scientific insight.⁹² Then he suggests that, in particular, dualism is flawed when applied to the question of free will and determinism, because the barrier that demarcates the two coexisting truths must be crossed in cases in which an excuse is granted.⁹³

With respect to the first of these two points, Moore makes the following argument:

⁹⁰ If this dualist analysis holds for the offender who is the product of a "rotten social background," it should obviously apply with equal if not greater force to one who is chemically dependent. A uniquely strong foundation has been laid for the application of the objective viewpoint in such cases by the prevailing medical model of chemical dependency. This model typically includes genetic and biochemical factors within the causal matrix alongside environmental determinants of conduct. As will be discussed below, causal explanations that claim a physical as well as a psychological component tend to be privileged in our excuse-granting practices. See *infra* notes 233-33 and accompanying text. Indeed, it is worth noting that, although efforts to establish a loss-of-control excuse like the one pressed in the *Moore* case have so far been unsuccessful, the medical model of addiction and alcoholism has gained considerable popular acceptance. See Sheila B. Blume, *The Disease Concept of Alcoholism*, 1983, 5 J. PSYCH. TREATMENT & EVALUATION 471, 472 (1983); see also Edward W. Desmond, *Out in the Open: Changing Attitudes and New Research Give Fresh Hope to Alcoholics*, TIME, Nov. 30, 1987, at 80, 81 (reporting the results of a Gallup poll which found that "a great majority of American adults are convinced that alcoholism is indeed an illness").

⁹¹ Moore, *supra* note 4, at 1127.

⁹² See *id.* at 1126-27. On "ordinary language" theory, see RICHARD J. BERNSTEIN, *PRAXIS AND ACTION: CONTEMPORARY PHILOSOPHIES OF HUMAN ACTIVITY* 230-304 (1971).

⁹³ See *id.* at 1127.

Suppose we place ourselves in ancient Babylon at just the time the Babylonian astronomers were discovering that the star that appears in the morning ("The Morning Star") and the star that appears in the evening ("The Evening Star") are one and the same thing, namely, the planet Venus. One can imagine a Babylonian ordinary-language philosopher "disproving" the astronomers' claim in the following way: The philosopher has not been looking at stars, but at language use. He has observed the phrases "Evening Star" and "Morning Star" in all their ordinary uses, and has learned from such observation that the phrases appear in different categories of discourse, evening talk and morning talk. Accordingly, the phrases cannot refer to the same thing. If they did, a well-known law of the logic of identity would require that the expressions be equivalent. Their differing uses, however, show that they manifestly are not equivalent; indeed, it is absurd—a category mistake—to even speak of the evening star and morning star as existing in the same sense of "exist."

This example illustrates the problem of the ordinary-language view of meaning and its accompanying doctrine of categorical differences. Inferences from patterns of ordinary usage cannot replace scientific insight about the true nature of the things to which words refer. Science cannot be barred from making discoveries, whether about planets or about minds, in the way the doctrine of category differences claims it can. A more contemporary view of meaning holds that the meaning of words like "intention" is given by the best scientific theory that one can muster about the true nature of intentions, even though that theory may involve knowledge that most ordinary speakers do not have and that, accordingly, is not reflected in their ordinary usage

...⁹⁴

Initially, Moore's dismissal of the Babylonian philosopher makes sense, given that ordinary-language theory based solely upon linguistic analysis cannot, as a matter of logic, support the morning star/evening star distinction in the face of conflicting scientific insight. On the other hand, once the question is placed within a larger social context, the nature of the scientific counterargument is changed. Moore's preference for the Babylonian astronomers' interpretation of the planet Venus is based upon his observation that the philosopher is studying "language use" instead of stars.

⁹⁴ *Id.* at 1126.

Suppose, however, that we introduce a third category of scholars, anthropologists, who are able to describe a series of social practices, fundamental to the daily structuring of Babylonian society, that stem from their longstanding belief in the coexistence of the morning and evening stars. Perhaps there are important religious practices that derive from the dualist cosmology, or a unique system of timekeeping that depends upon a common belief in the separability of the two stars.⁹⁵ Now the debate about the "true nature of things to which words refer" has been fundamentally altered. The dualist's claim no longer depends upon sterile linguistic rules governing "category mistakes."⁹⁶ Rather, the signifiers within this linguistic system—words such as "evening star" and "morning star"—have been paired with signified objects or linguistic referents—the fully-contextualized daily practice of the Babylonians—so that the words now have a meaning which is as real to the speakers of this language as the scientific meaning provided by the astronomers' discovery.⁹⁷

Like the work of the Babylonian astronomers, Moore's work on causation and the excuses is animated by realist theory rather than a conventionalist understanding of what it means to describe an agent as autonomous.⁹⁸ Moore provides an accurate account of

⁹⁵ On the nexus between language and culture, see John O. Cole, *Thoughts from the Land of And*, 39 MERCER L. REV. 907, 922-23 (1988) (arguing that the "constructedness" of language plays a central role in constructing our world). Cf. Arthur A. Leff, *Law and*, 87 YALE L.J. 989 (1978) (providing a hypothetical anthropology in support of his argument that legal institutions must be understood within the systems of social meanings in which they occur).

⁹⁶ Moore, *supra* note 4, at 1125.

⁹⁷ On the relationship between linguistic signifiers and signified objects, see BELSEY, *supra* note 11, at 38-39; COLIN SUMNER, *READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW* 20-21 (1979); Cole, *supra* note 95, at 921.

⁹⁸ Moore's clearest statement of the realist philosophy on which his work is predicated may be found in Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985). See Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. PA. L. REV. 1293, 1294-95 (1992) (criticizing Moore's metaphysically realist theory of meaning from the perspective of ordinary language philosophy).

John Cole suggests that there are two ways of understanding our world. In the "Land of Or," we assume that "every genuine question has one true answer,' that 'the method which leads to correct solutions to all genuine problems is rational in character,' and that '[t]hese solutions . . . are true universally, eternally and immutably.'" Cole, *supra* note 95, at 911 (quoting ISAIAH BERLIN, *AGAINST THE CURRENT* 80, 81 (1979)). By contrast, in the "Land of And," we recognize that "everything potentially exists in a state of contradiction," *id.* at 914, that this contradiction "can only be removed by choosing a frame of reference," *id.*, and that the choice of frames is profoundly governed by social context. See *id.* at 918.

excuse doctrine within the criminal law in much the same way that the Babylonian astronomers provided an accurate account of Venus. His analysis brings into full view the role of character—carried in his account through the vehicle of practical reasoning—as that attribute which renders an agent responsible. Moreover, the common law requirements of voluntariness and (especially) *mens rea* are made comprehensible by his theory, in that they are described as doctrinal instruments designed to test the capacity and opportunity of the defendant to engage in practical reasoning.

Moore's further claim, however, that practical reasoning is *really* what matters cannot be sustained any more than the astronomers' assertion with respect to the unity of the morning and evening stars, if by "really" one means that practical reasoning has some sort of independent epistemological significance.⁹⁹ Statements, propositions or systems of ideas do not become invested with meaning until they are placed within a social context.¹⁰⁰ In order for Moore's theory of responsibility to have the status he claims for it, it must be grounded in some understanding of what people actually think, feel, and believe. Thus, while Moore provides us with a good *theory* in the sense that his work has the capacity to predict accurately which actors will be held responsible for their conduct, he does not provide much of an account of how people actually experience the *practice* of assigning or withholding responsibility.¹⁰¹

The failure of advocates to gain judicial sanction for a loss-of-control defense in cases involving alcoholism or addiction is illustrative of this gap between Moore's theory of responsibility and our actual experience in assigning blame within the criminal law. According to Moore, the fact that an addict's decision to use

⁹⁹ Cf. Alexander, *supra* note 63, at 3 (describing a false epistemology in which "[t]he individualism and rationalism embraced in contemporary jurisprudence" are criticized as being "inherently limited, and limiting, perspectives").

¹⁰⁰ "At the branching point, social scientists question natural science models as representations of human experience, and, in different ways, embrace the premise that the meanings of cultural and social forms are constituted in their use." Greenhouse, *supra* note 11, at 687. See also MANNHEIM, *supra* note 11, at 93 (arguing that all knowledge is mediated by "the total conception of ideology" since "[o]nly when we are thoroughly aware of the limited scope of every point of view are we on the road to the sought-for comprehension of the whole.").

¹⁰¹ For Moore's view as to what constitutes a good theory of excuse, see Moore, *supra* note 4, at 1099-1100. Moore's claim is that his theory goes beyond mere description or explanation to provide a normative basis for understanding and applying excuse doctrine. But see, Fish, *supra* note 89, for a different view of the relationship between theory and practice.

narcotics was caused by factors such as genetics or early childhood experience is not determinative in figuring his or her responsibility; instead, the theory focuses upon the actor's capacity for practical reasoning.¹⁰² Framed as a question about cognitive capacity, it is relatively easy to see that addictive disorders short of insanity generally will not yield an excuse, given that most users are able to form an intention with respect to their addictive behavior. In this respect, Moore's theory is highly predictive of actual outcomes. His claims do not, however, comport with a more common view of chemical dependency, which holds that the conduct of addicts and alcoholics is the product of a struggle between nonautonomous factors inclining them toward abuse and an autonomous free will that could, and should, resist such a craving.¹⁰³

Moore's theoretical notion of responsibility relies upon a technical distinction between the conditional and absolute forms of the construction "could have done otherwise."¹⁰⁴ Essentially, the unconditional form requires that the actor be possessed of a decision-making capacity undetermined by extraneous factors. By contrast, the conditional sense of "could," which Moore endorses, requires only that the agent have the opportunity and capability to do otherwise.¹⁰⁵ This distinction helps to carry Moore's revised

¹⁰² Moore, *supra* note 4, at 1131.

¹⁰³ See, e.g., Rosemary L. McGinn, *For Me, Alcohol Is A Disease*, N.Y. TIMES, Dec. 3, 1987, at 35 ("My alcoholism is a disease, medically treatable. But my ongoing recovery depends on making healthy responsible choices every day."). Also typical of this point of view are comments made by the victim of a noted compulsive obscene telephone caller, reported in a recent news account:

Appearing on ABC's "Nightline," [the victim] listened stonily as the [caller and his psychiatrist] told how he recalled being sexually abused as a child—a memory "triggered" at the funeral of his father, who died in the very room where the abuse occurred. That, [the victim] snorted, was no excuse. [The caller] may well have been sick, but he should have controlled himself. "Each time they [obscene callers] make that choice, they know that what they're doing is wrong. They can choose to continue their illness, or they can choose to say, 'That's it, I stop and I'm going to get help.'"

David Gelman, *Was It Illness Or Immorality? Debate Over An Obscene Caller Ruffles Washington*, NEWSWEEK, June 11, 1990, at 55.

Of the various opinions in the Moore case, Judge Wilkey's discussion of addiction as a struggle between the actor's "craving" and "strength of character" comes closest to mirroring this point of view. See *infra* text accompanying notes 164-64.

¹⁰⁴ Moore, *supra* note 4, at 1142.

¹⁰⁵ This distinction between the absolute and conditional forms of the construction "could have done otherwise" was first developed in the work of G.E. Moore. See G.E. MOORE, ETHICS 84-95 (1912); see also Moore, *supra* note 4, at 1142-43 (discussing G.E. Moore's interpretation of the principle of responsibility).

theory of responsibility because it makes it possible for him to dodge the principle of transfer of powerlessness.¹⁰⁶

Framed in terms of desert, it would be fair to say that Moore's theory does not require that desert go "all the way down,"¹⁰⁷ since the basis of responsibility he adopts depends upon a practical reasoning process which itself may be unfree.¹⁰⁸ However, in order to reject the principle of transfer of powerlessness as Moore's theory invites us to do, we must be willing to agree that human actors deserve the conditions which determine their choices.¹⁰⁹

¹⁰⁶ Presumably, Moore would not deny that the conduct of someone who is chemically dependent might be the product of nonautonomous factors as well as choice. If we were interested in bringing forward all the factors that contributed to the conduct, in an effort to describe as precisely as possible how that behavior came about, Moore would no doubt agree that the causal account would be relevant. What he would deny is that any such broad causal explanation is relevant to assigning blame within the criminal law; we simply should not be interested in constructing such explanations, because we should not regard the reasons why someone "did it" as relevant to whether or not he or she is responsible. At bottom, Moore seems to be making a substantive claim about the content of morality, to be accepted or rejected by reference to what he takes to be shared moral intuitions.

In this respect, the quotes adduced in footnote 102 seem to display exactly the sort of intuition Moore has in mind: the victim of the obscene caller seems to feel that it is irrelevant why the caller harassed her—what matters is that he chose to call and that he could have chosen to say "that's it, I stop." That she is willing to accept that the desire to make such calls proceeds from an "illness" only strengthens the point: her moral intuition is that the cause of his behavior does not matter, capacity is what counts, and the caller's capacity to do otherwise leads the victim to hold him responsible for failing to choose correctly. When Moore turns to the conditional versus the absolute forms of the phrase "could have done otherwise," he is engaging in unpacking this moral intuition. No one, Moore seems to be saying, really believes that one is responsible only for those acts that are wholly undetermined by extraneous factors.

The difficulty with this form of analysis, however, is that it fails to consider the general question of where these moral intuitions come from. In addition, it fails to take account fully of the gap between a theoretical treatment of an actor's cognitive process—under which it does not matter that the rules of determinism regard all rational thought as caused—and our common practice of viewing most cognitive work as autonomous. Thus, the victim of the obscene caller might agree that the caller's desire to act was an "illness," but she surely would not agree that his decision-making process was itself wholly determined. It is with respect to this assumption of free will that an analysis based upon theories of social construction must be employed.

¹⁰⁷ This phrase is taken from ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 225 (1974). See also Weinreb, *supra* note 4, at 74-75 (discussing whether desert actually does go "all the way down").

¹⁰⁸ See, e.g., KELMAN, *GUIDE TO CLS*, *supra* note 1, at 88-90 (describing the reasoning process as unfree in the sense that it may be determined by factors beyond the control of the agent).

¹⁰⁹ If people are to be held responsible for the consequences of choices over which they have less than fully autonomous control, they are, in some sense, being

Stated in this explicit fashion, it seems unlikely that most people would agree to make freedom independent of desert, even though such a decoupling in fact characterizes the outcomes of our blaming practices.

Most members of the community are not philosophers capable of an expansive detachment from deeply inscribed social convention. For most of us, it would be difficult to assign blame in an individual case of wrongdoing if we understood clearly that the offender's cognitive or evaluative process was as fully determined as was his or her craving.¹¹⁰ Our experience of blaming requires that we understand human choices to be truly autonomous, in the sense that they are free from the determining force of factors beyond the control of the agent. That we accept outcomes inconsistent with such a normative posture means that both truths contained within the intentionalist/determinist dualism must obtain and both must be managed within the context of daily practice.¹¹¹

The second ground of Moore's attack upon the dualist conception of freedom and responsibility revolves around this need to manage its two inconsistent truths. He argues that the boundaries between the determinist and intentionalist notions of human conduct must be clearly defined and permeable if there is to be any

held responsible for the conditions which go to determine their decision making. See Weinreb, *supra* note 4, at 75.

¹¹⁰ This point was made by C.A. Campbell in criticizing G.E. Moore's conditional/unconditional distinction:

For how can a man be morally responsible . . . if his choices, like all other events in the universe, could not have been otherwise than they in fact were? It is precisely against the background of world-views such as these that for reflective people the problem of moral responsibility normally arises.

Campbell, *supra* note 27, at 124.

¹¹¹ See Percy W. Bridgman, *Determinism and Punishment*, in DETERMINISM AND FREEDOM 143 (Sidney Hook ed., 1958). Bridgman notes that:

[W]e have to recognize clearly that there are two levels of operation. There is the level of daily life and social interaction, i.e., the level of "free will," and there is the deterministic level

. . . .

There is, and can be, no sharp dividing line between the vocabulary of determinism and that of daily life

. . . .

. . . At present the only technique we have for dealing with our fellows is to act as if they were the same sort of creatures as we ourselves. We disregard determinism when dealing with ourselves—we have to disregard it, within reason, in our everyday contact with others.

Id. at 143-45.

coherence within the dualist normative universe. They must be clearly defined because otherwise the causal roots of behavior would intrude upon the intentionalist story which is the basis for assigning blame, making it impossible for individuals to be held accountable according to traditional principles of responsibility. In addition, they must be permeable because otherwise the causal roots of behavior could not be identified, making it impossible for individuals to be excused according to the causal theory. In addition, says Moore, the causal theory must be able to indicate when these boundaries should be crossed, so that excuses can be granted and withheld in a principled fashion.¹¹²

Here again, at the level of theoretical criticism, Moore makes a good point. If human conduct is simultaneously caused and the product of an autonomous free will, our occasional shift from the participant to the objective viewpoint ought to be predictable according to some factor or factors which we can identify in advance. In fact, Moore's theory provides the means for making just this sort of prediction. The key element of his theory, a judgment with respect to the offender's opportunity and capacity to engage in practical reasoning, is the very factor that determines on which side of the dualist divide a given case will reside. In a manner of speaking, choices about whether to allow an excuse in a specific case or class of cases do get made. It is a mistake, however, to believe that those choices are experienced as (rather than predicted by) the application of Moore's theory of responsibility, the causal theory, or any other concatenation of abstract principles. People "see" or "understand" or simply "live" through one or the other of Strawson's perspectives as a consequence of deep social convention. As Lloyd Weinreb has put it, "we ordinarily know unhesitatingly which of the alternative points of view to adopt.

¹¹² See Moore, *supra* note 4, at 1128. Weinreb puts the point as follows:

When an attribution of desert is challenged on the kind of grounds that, if accepted, constitute an excuse, the abstract issue is made concrete by evidence that supports the "objective" standpoint. Not every such explanation will be accepted; the very core of Strawson's argument about dual stand-points is that not every such explanation can be accepted, although in principle one might be offered in every case. If we insist on the attribution, despite the actual or theoretical availability of an explanation from the other standpoint, we have to provide an answer to the protest, "I don't deserve this."

Weinreb, *supra* note 4, at 60.

Even to say that we 'adopt' a point of view is too much; rather, we simply perceive from one point of view or the other."¹¹³

C. *The Ideological Function Of Criminal Law Blaming Practice*

Dualism, then, allows the causal theorist to avoid Moore's *reductio* argument by describing human conduct as simultaneously free and determined. These seemingly inconsistent truths persist because the divide between actions and causes is ideological; it is a social construction which derives from collective activity.¹¹⁴ Contrary to Moore's claim, this dualism does not depend upon the metaphysical or linguistic manipulations of theorists.¹¹⁵ It is a necessary creature of social life.¹¹⁶

Indeed, a permanent adoption of one perspective and a corresponding categorical rejection of the other would be impossible. As Frankfurt makes clear, the near universal practice of blaming or praising the conduct of individual human actors is fundamental in distinguishing people from objects and the other animals.¹¹⁷ Human society depends upon the existence of autonomous actors who are capable of considering alternatives and making free choices that direct their behavior.¹¹⁸ This notion of individual autonomy is significant, because, apart from God, the only autonomous agents within our universe are ourselves and other human actors.¹¹⁹

¹¹³ *Id.* Cole provides a similar description when he says that:

[w]e decide *all at once* through what frame we should assess or define "guilt" [W]e restructure the world *all at once* by making a simultaneous decision about how we will classify this defendant and what classification system we will use to define the concept of "guilt," or "criminal responsibility," in general.

Cole, *supra* note 95, at 918 (emphasis added).

¹¹⁴ Cf. Richard Delgado, *Storytelling For Oppositionists And Others: A Plea For Narrative*, 87 MICH. L. REV. 2411, 2414 n.14 (1989) (citing Lévi-Strauss for the proposition that "myths are used by social groups to overcome contradiction").

¹¹⁵ See Moore, *supra* note 4, at 1127.

¹¹⁶ See Bridgman, *supra* note 111, at 143-45.

¹¹⁷ See Frankfurt, *supra* note 37, at 66-67; see also Sidney Hook, *Necessity, Indeterminism, and Sentimentalism*, in FREE WILL AND DETERMINISM, *supra* note 9, at 45, 48 ("Sickness, accident, or incapacity aside, one feels lessened as a human being if one's actions are always excused or explained away on the ground that despite appearances one is really not responsible for them. It means being treated like an object, an infant, or someone out of his mind.").

¹¹⁸ See *id.*; Boldt, *supra* note 61, at 996-1003.

¹¹⁹ Indeed, this capacity for self-actualization means that each of us has a bit of the divine within us. See EMILE DURKHEIM, *SELECTED WRITINGS* 145-46 (Anthony

At the same time, we all share an instinct to search for causal explanations for occurrences in our environment. The real bite of the determinists' theory is that its characterization of human conduct is consistent with this instinct.¹²⁰ The proposition that human conduct is determined by factors extraneous to the individual agent is true because it must be so by definition, but the proposition that human conduct is ordinarily the result of autonomous decision-making on the part of the individual actor is also true because without this belief human society might well become dysfunctional.

It is, of course, a fair question to ask how these two opposed realities are governed in everyday life. Strawson suggests that the "appearance of contradiction" between the participant and objective viewpoints arises only when the matter is considered from a standpoint outside of culture. Standing inside society, he asserts, the contradiction is "dispelled," because we are always already looking through one or the other of the two lenses.¹²¹

If we proceed from the liberal premise that individuals are pre-social beings with definable characteristics independent of social practice, Strawson's socially-contextualized resolution of the problem will not work. Once we adopt a perspective that views the characteristics of individualism as socially constructed,¹²² however, it becomes possible to search for examples of social practice that instill in members of the community the ability unconsciously, yet purposefully, to shift between the participant and objective viewpoints.¹²³

Giddens trans. & ed., 1972) (reproducing a translated excerpt from EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY*); see also Steven Lukes, *Durkheim's 'Individualism And The Intellectuals'*, 17 POL. STUD. 16, 25 (1969) (discussing a "religion of humanity whose rational expression is the individualist morality").

¹²⁰ See UNGER, *supra* note 63, at 199-202. Unger notes that:

Because man has no predetermined place in nature, he must make a place for himself in it. In doing this, he is not satisfied with treating the natural world as a source of means to the achievement of his ends. He wants to recognize himself as one who belongs to the natural order from which he has been thrown out by the gift of consciousness. The sentiment of being part of the whole of nature is as deeply rooted in the self as the experience of its separation from nature Thus, all human activities have a twofold aspect. On the one hand, they acknowledge and perpetuate the barrier between the conscious self and the natural world that is the condition of subjectivity. On the other hand, they seek to bridge the gap.

Id. at 202.

¹²¹ STRAWSON, *SKEPTICISM AND NATURALISM*, *supra* note 2, at 38.

¹²² See Louis M. Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 173 (1990).

¹²³ A central tenet of liberal individualism is the notion that every person is a

The criminal law is the most visible and explicit institutional setting for the working out of questions of individual responsibility.¹²⁴ The legal doctrines of *actus reus* and *mens rea*, together with the rules governing the excuses, constitute the institutional mechanism by which individual cases are allocated to one side of the dualist divide or the other. Taken on their own terms, these doctrinal formulations are capable of sorting out a vast array of human conduct, placing much of it on the participant side of the moral ledger and some on the objective side.¹²⁵

morally significant agent as a consequence of his or her capacity to act freely and autonomously. Moreover, this intellectual tradition holds that the characteristics that render an individual free and autonomous—and therefore morally significant—do not derive from social interaction, but exist prior to his or her entry into society. See LACEY, *supra* note 60, at 144-46. A necessary conclusion drawn from these premises by liberal theorists is that social groups are nothing more than collections of individuals.

Roberto Unger has pointed out that this conclusion is important both methodologically and morally. Methodologically, it means that a social group can be fully described by reference to the pre-social attributes of its constituent members and can have no characteristics beyond those brought to it by participating individuals. Morally, it means that the group must never be understood as a "source of values in its own right." UNGER, *supra* note 63, at 81-82.

The point of view adopted by Unger and other critics of liberal individualism, by contrast, is that a social group is an "entity with independent existence irreducible to the lives of its members, with group values that stand apart from the individual and subjective ends of its membership." *Id.* at 82. From this alternative point of view it is methodologically possible to identify group attributes, in the form of social practices and conventions, that derive not from the essence of its individual members but from a process of interaction among them. Additionally, from a normative standpoint, it becomes possible to assign moral significance to attributes of the group—or what we might term the ideological content of the group—in recognition of the fact that values held by the group taken as a whole may not be identifiable at the level of the individual, who may hold such values "only partially and insofar as they are absorbed into the group." *Id.*

¹²⁴ With respect to the general claim implicated above, that the legal system operates to construct consciousness, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984) (noting that "lawmaking and law-interpreting institutions have been among the primary sources of the pictures of . . . some of the most commonplace aspects of social reality that ordinary people carry around with them and use in ordering their lives"). As to the more particular claim, that the criminal law operates to construct notions of autonomous individual responsibility, see Cole, *supra* note 95, at 911, 925 ("In the framework of our law, the defendant is seen through a prism of individual responsibility and free choice."). For a more utilitarian view of the expressive function of the criminal law, see FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* 18-19 (1938) (discussing the role of the criminal law in motivating and guiding conduct); Gordon Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habitual Effects*, 1969 WIS. L. REV. 550, 557-58 (surveying the societal benefits of criminal punishment).

¹²⁵ "[T]he defendant exists in the space of being guilty and not guilty and awaits creation as one or the other. This 'all at once' decision is what a criminal trial is all

Moreover, as Mark Kelman has made clear, the substantive criminal law is pervaded by "interpretive constructs," "arational" practices by which the universes of available facts and legal rules are winnowed so that only "relevant" facts and "applicable" rules remain to shape the outcome of a particular adjudication.¹²⁶ Kelman identifies a number of these interpretive constructs, among which he includes broad and narrow time frames, disjointed and unified events, and broad and narrow views of intent.¹²⁷ All of these practices operate selectively to obscure or to reveal the determinist account lurking behind every instance of human conduct.¹²⁸

For example, the interpretive construct involving time framing regulates the extent to which facts about a defendant's personal history and facts about events before and after the precise moment of a criminal incident will be made a part of the formal proceedings. Resolution of this question goes a long way toward defining the defendant's conduct in intentionalist or determinist terms, because inclusion of such information through broad time framing (the designation of it as relevant to the legal question) frequently provides evidence of causal factors beyond the control of the agent, while exclusion through narrow time framing creates the illusion of autonomy.¹²⁹

Similarly, with respect to the interpretive construct governing disjointed and unified accounts, criminal law doctrine can shape the legal story so that facts occurring over time are characterized as a single event or as a series of discrete events. Disjoining sequential facts frequently has the effect of rendering irrelevant information which otherwise may prompt the causal account. Alternatively, a

about" Cole, *supra* note 95, at 919. See also LOUIS ALTHUSSER, *FOR MARX* 232-34 (1969) (claiming that the law "transforms" the "human subject" into a "legal subject" and thereby influences perceptions of social relationships).

¹²⁶ See Kelman, *Interpretive Construction*, *supra* note 1, at 592; see also J.M. Balkin, *The Rhetoric Of Responsibility*, 76 VA. L. REV. 197 (1990) (discussing the recurring rhetorical devices employed throughout diverse areas of law to characterize competing notions of responsibility).

¹²⁷ See Kelman, *Interpretive Construction*, *supra* note 1, at 593-96. Cole's discussion of shifting "frames" is somewhat similar. See Cole, *supra* note 95, at 914-16 (arguing that it is by choosing a frame of reference that we "create" the defendant as guilty or innocent).

¹²⁸ See Cole, *supra* note 95, at 915 (arguing that when the defendant is "created" as guilty or not guilty at trial, "the other account . . . is suppressed"); cf. Greenhouse, *supra* note 68, at 1637 (observing that contesting notions of time are mediated through the legal system in such a way that crucial differences are "suppressed" or "blurred").

¹²⁹ See Kelman, *Interpretive Construction*, *supra* note 1, at 594, 600-05, 642-45.

decision to view such a sequence together can have the effect of exculpating the defendant by bringing his or her "conduct" within one of the categories of excuse.¹³⁰

Kelman concludes his work on interpretive construction by suggesting three possible characterizations of his own analysis. First, he suggests that the reader might interpret his article as garden variety legal realism.¹³¹ Alternatively, he acknowledges that his work may be understood as an attempt to account for and describe the operation of interpretive construction at a level of abstraction higher than that afforded by traditional doctrinal analysis.¹³² Finally, he offers the possibility that his enterprise is merely aesthetic because interpretive constructs "are not politically meaningful at all, but simply inexplicably unpatterned mediators of experience, the inevitably nonrational filters we need to be able to perceive or talk at all."¹³³

All three of Kelman's characterizations of the operation of interpretive construction within the criminal law are plausible. His designation of the third option as merely "aesthetic," however, may have prevented him from identifying a fourth, related possibility: that inconsistent time framing and the other interpretive constructs function as mechanisms by which a determinist/intentionalist dualism is managed within the criminal law, and by extension, within society generally.

If we accept the premise that the criminal law performs an ideological function on behalf of the group,¹³⁴ then it may be possible that Kelman's interpretive constructs are not "inexplicably unpatterned mediators of experience,"¹³⁵ but quite highly patterned structures which *shape* experience. Complex human stories frequently contain an amalgam of information, some of which fits

¹³⁰ See *id.* at 594-95, 642-45.

¹³¹ See *id.* at 669.

¹³² In this respect, Kelman suggests that the selective obscuration of the deterministic roots of human conduct may serve to maintain a hierarchical class structure. See *id.* at 670.

¹³³ *Id.* at 671.

¹³⁴ The suggestion here is that criminal law blaming practice is an institutional process by which a socially constructed reality, an ideology of individual autonomy, is created. See Boldt, *supra* note 61, at 974-76; see also, Richard A. Ball, *A Theory of Punishment: Restricted Reprobation and the Reparation of Social Reality*, in *STRUCTURE, LAW, AND POWER: ESSAYS IN THE SOCIOLOGY OF LAW* 135, 141-42 (Paul J. Brantingham & Jack M. Kress eds., 1979) (discussing the construction of a "symbolic universe"); Trubek, *supra* note 7, at 604 (explaining that "interpretivists" understand the legal system as constructing notions of individual volition).

¹³⁵ Kelman, *Interpretive Construction*, *supra* note 1, at 671.

more readily with the participant viewpoint and some of which is easily cognizable within the objective perspective. As those stories are translated into legal narratives molded by the criminal law doctrines that define offenses and the excuses, they become rationalized, unified, and suitable for a focused viewing through one of our two available lenses.¹³⁶ In the process, we acquire a generalized ability to attend to some information we encounter in daily life and to filter out other data we confront, so that we are able to maintain a line of separation between the two perspectives.¹³⁷

This relationship between the work of formal blaming within the criminal law and the informal and unconscious attributions (and nonattributions) of responsibility we make all the time in daily life is difficult to characterize. Roberto Unger makes the point that within every social situation there is a "dominant social consciousness."¹³⁸ He suggests that a mentality achieves dominance not because it is held by the most powerful within the group or the most numerous but rather because it is actualized—played out—in the practices of the social order. Thus, a particular way of comprehending reality becomes dominant within the group when individual interactions within society are "arrange[d] . . . similarly to the ways in which the type of consciousness pictures their relations."¹³⁹

It may well be that Moore's theory provides an abstract template for mapping the rhetorical patterns of interpretive construction within the criminal law. Perhaps time frames are doctrinally elongated or constricted, events doctrinally conjoined or segmented, and intention defined broadly or narrowly, according to a pattern that correlates with the actor's capacity and opportunity to engage

¹³⁶ On the capacity of litigation to reformulate reality, see Shelley Bannister & Dragan Milovanovic, *The Necessity Defense, Substantive Justice and Oppositional Linguistic Praxis*, 18 INT'L J. SOC. L. 179, 198 (discussing litigation as a "translation process"). On the function of legal narratives generally, see Robin West, *Narrative, Responsibility and Death: A Comment On The Death Penalty Cases From the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 162 (1990) (arguing that when lawyers tell stories they "contribute to the creation of a community"). See also Allison G. Anderson, *Lawyering in the Classroom: An Address to First Year Students*, 10 NOVA L.J. 271 (1986); Robert M. Cover, *Foreword: The Supreme Court 1982 Term: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5; Delgado, *supra* note 114, at 2439.

¹³⁷ Cf. Cole, *supra* note 95, at 931-32 (arguing that the trial process "composes our world for us").

¹³⁸ UNGER, *supra* note 63, at 149.

¹³⁹ *Id.* Of course, the reverse—that a dominant reality shapes social interactions—may be true as well. See Hunt, *supra* note 7, at 18.

in practical reasoning. The ability of Moore's theory to predict outcomes suggests that such a correlation exists.

The predictive power of the theory, however, must be considered together with the gap between Moore's abstract description of responsibility and our everyday moral experience in assigning responsibility. As legal theorists considering the structure of doctrinal categories like insanity or duress, we can apply Moore's theory to determine whether a particular class of actors ought properly to be regarded as responsible; however, as a community generally employing fixed rules corresponding to a dominant social consciousness, we are merely likely to conclude that an individual is or is not responsible.¹⁴⁰

Weinreb makes a different but related claim regarding the role of legal doctrine in constructing social reality. In the course of considering the problematic doctrinal area of felony murder, in which criminal responsibility attaches even though the defendant's conduct may only be a "but-for" cause of resulting harm, Weinreb suggests that the law operates to reinforce "the deep ontological assumption that human experience is contained within, or composes, a normative order."¹⁴¹ The hard cases are those in which a normative natural order is called into question because harm occasioned indirectly by the defendant's conduct seems more readily to have been caused by the nonhuman agency of fate—for example, where a shot fired by the police while responding to a defendant's felonious conduct is the proximate cause of the death on which the felony-murder conviction is predicated.¹⁴² In such cases, criminal law doctrine works to attribute responsibility to the human actor, even though such an attribution does not comport with our ordinary understanding of desert, because to do otherwise would require us to blame nature itself.¹⁴³

¹⁴⁰ See KELMAN, GUIDE TO CLS, *supra* note 1, at 90-91; cf. Weinreb, *supra* note 4, at 61.

¹⁴¹ Weinreb, *supra* note 4, at 73.

¹⁴² Such a scenario is possible under the laws of at least some jurisdictions. See, e.g., *People v. Hickman*, 297 N.E.2d 582 (Ill. App. 1973), *aff'd*, 319 N.E.2d 511 (Ill. 1974) (upholding felony-murder conviction where shot that killed police officer was fired by other officers in pursuit of defendant); see also *Hickman v. Commonwealth*, 398 S.E.2d 698 (Va. Ct. App. 1990) (upholding conviction of accomplice in the felonious possession of a lethal drug dose, if the defendant helped to prepare the drug injection). But see *King v. Commonwealth*, 368 S.E.2d 704 (Va. Ct. App. 1988) (finding second degree felony murder rule not applicable to death of a co-felon in plane crash if plane was feloniously transporting drugs but the crash was not directly caused by the felonious purpose of the flight).

¹⁴³ See Weinreb, *supra* note 4, at 76.

At one level of abstraction, the practice of attributing responsibility to human actors in felony-murder cases worries us because desert attaches even though the felon may not have been free to control circumstances that fundamentally determined the consequences of his or her conduct. At a higher level of abstraction, however, the incapacity of the felon to control the circumstances leading to the victim's death should be no more troubling than the felon's incapacity to control his or her own decision-making processes. Desert and freedom may not coincide for the defendant in a felony-murder case, but then neither do they coincide for any human actor in any case, once the truth of determinism is granted. In the final analysis, Weinreb suggests, the criminal law holds the defendant responsible in a felony-murder case "in order not to undermine the conventional basis of desert altogether, by calling into question whether a person can ever truly be said to have acted with freedom and responsibility despite the determinate conditions of his existence."¹⁴⁴

II. THE PROBLEM OF CHEMICALLY-DEPENDENT OFFENDERS

Returning to the question posed by the *Moore* case, we can begin to lay the foundation for a similar claim regarding the criminal law's treatment of chemically-dependent offenders. On January 29, 1970, Raymond Moore was arrested by members of the Washington, D.C., Metropolitan Police Force and charged with possession of heroin. At trial, Moore's counsel offered the testimony of a psychiatric expert that Moore was an addict who was "compelled" to obtain and use heroin.¹⁴⁵ The expert testimony had been offered to further

Although we are acquainted with natural fortune and misfortune of all kinds, [in a case like *Hickman*] the intervention of what we think of as a humanly (that is, self-determined) wrongful act strains the assumption that the death is within a normative order at all; the explicit evidence of normative disorder is too great. By identifying the commission of the felony as the cause of the death and attributing the death to the felon, it is as if we exculpate nature (which is not without some responsibility).

¹⁴⁴ *Id.* at 77.

¹⁴⁵ Moore's testimony before the trial court was that he had used heroin on a regular basis since 1946 and that at the time of his arrest he was addicted to heroin. He further testified that in the weeks immediately preceding his arrest, his addiction ranged from 50 to 70 capsules a day. Moore did not live at the hotel in which he was arrested but had come to the hotel in order to purchase the 50 capsules of heroin which were in his possession at the time of arrest. His testimony was that he had come to the hotel room 10 or 15 minutes before the police arrived and that he

Moore's contention that basic common law principles of criminal responsibility exculpate a defendant when he or she "is so far addicted to [the] use of habit-forming narcotic drugs as to have lost the power of self-control."¹⁴⁶

The trial court refused to allow the jury to hear the expert's testimony, presumably because it disagreed with Moore's assertion that a loss of control caused by addiction could form the basis for an excuse. As the issue was framed on appeal, the question became whether "possession of heroin by an addict, though conscious and intentional, lacks elements indispensable to criminality under fundamentals of our system of justice."¹⁴⁷ More broadly, the question in the case was whether an impaired ability to exercise choice occasioned by a defendant's dependence upon an addictive substance should relieve that defendant of criminal responsibility for conduct closely associated with that addiction.

Moore's argument was nonconstitutional in nature, and turned upon an interpretation of the common law and statutory rules governing criminal responsibility and the granting of excuses. In this respect, the case can be distinguished from *Powell v. Texas*,¹⁴⁸ an earlier United States Supreme Court case in which a similar argument framed in constitutional terms had been raised by an alcoholic defendant charged with public intoxication.¹⁴⁹

intended to use the purchased heroin that night and the next morning before going to work. See *United States v. Moore*, 486 F.2d 1139, 1211-12 (D.C. Cir. 1973) (Wright, J., dissenting), *cert. denied*, 414 U.S. 980 (1973).

¹⁴⁶ *Id.* at 1164 (Leventhal, J., concurring).

¹⁴⁷ *Id.* at 1178.

¹⁴⁸ 392 U.S. 514 (1968).

¹⁴⁹ *Powell*, in turn, can be distinguished from *Robinson v. California*, 370 U.S. 660 (1962), an even earlier Supreme Court case in which a California law making it a criminal offense to be "under the influence of" or "addicted to" the use of narcotics was found to violate the Eighth Amendment's prohibition against Cruel and Unusual Punishment. The various opinions in *Robinson* suggested at least two bases for this holding: first, that it is unconstitutional to attach criminal liability to a mere status in the absence of some positive conduct; and, second, that it is unconstitutional to punish as criminal a status that may have been involuntarily acquired. The defendant in the *Powell* case sought to build upon the second of these two rationales by suggesting that his conviction for public intoxication was unconstitutional in light of the involuntary nature of his conduct. See *Powell*, 392 U.S. at 531-35. In rejecting this argument, Justice Marshall, writing for a plurality of the Court, made clear that it was not the lack of volition, but the lack of any conduct whatsoever, which had created the constitutional infirmity in *Robinson*. Since *Powell* had engaged in affirmative conduct by appearing in public, the plurality held that he could constitutionally be subjected to criminal punishment. *Id.* at 535-37.

In his opinion for a plurality of the Court in *Powell*, Justice Marshall declined to recognize a constitutional rule that a defendant's conduct must be the product of his or her volition or free will in order for criminal liability to attach. Although he pointed out significant weaknesses in the trial record and took issue with Powell's characterization of alcoholism as a "disease," Justice Marshall's holding proceeded principally from a clear reluctance to begin the process of building a constitutional law of crimes, given the Constitution's virtual silence as to matters of substantive criminal law.¹⁵⁰ Nevertheless, the opinion did invite defendants to press common law and statutory arguments of a similar nature in state courts:

The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.¹⁵¹

This invitation to seek an "adjustment" of the substantive criminal law in nonconstitutional fora was duly taken up by the defendant in the *Moore* case. Not surprisingly, many of the same concerns which had given pause to the *Powell* plurality reemerged in the *Moore* majority's treatment of parallel arguments, now transposed to sound in nonconstitutional terms. Once again, the effort to obtain judicial recognition of a new addiction/alcoholism defense was turned back.¹⁵²

¹⁵⁰ Marshall seemed troubled by Powell's testimony that he had managed to limit himself to one drink on the day of trial. Indeed, Marshall argued that the trial court's findings regarding Powell's "chronic alcoholism" were not "findings of fact" in any recognizable, traditional sense." *Powell*, 392 U.S. at 521 (plurality opinion). With respect to the characterization of alcoholism as a disease, Marshall suggested that this was merely the result of the medical profession's decision to "attempt to treat those who have drinking problems," and did not represent any sort of scientific consensus as to what alcoholism was or how it ought to be managed. *Id.* at 522-24. Most important, though, were Marshall's doubts regarding the wisdom of constitutionalizing notions of criminal responsibility. In his words: "It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers." *Id.* at 537.

For a good discussion of the Constitution's silence as to matters of criminal responsibility, see Kent Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927 (1969) (pointing out that only the Eighth Amendment and, perhaps, the prohibitions against *ex post facto* laws speak to substantive matters within the criminal law).

¹⁵¹ *Powell*, 392 U.S. at 536 (plurality opinion).

¹⁵² Several years before *Moore*, the D.C. Circuit, in *Watson v. United States*, 439

A. *The Judicial Debate*

Skelly Wright, who, along with three other members of the Court dissented from the majority's holding,¹⁵³ embraces the exculpatory claims raised by the defendant. In his opinion, Judge Wright sets out the contours of a new defense he would make available to addicted defendants like Moore. In his view, the relevant question is whether addicts should be blamed and punished or treated as diseased persons in need of treatment.¹⁵⁴ Wright goes about answering this question by setting out a wealth of detail regarding the "disease model" of addiction.¹⁵⁵ Perhaps most significant for present purposes, he describes both the "initial decision to experiment with addicting drugs" and the "effects of this initial exposure" in classically deterministic terms, which "rang[e] from the biochemical to the cultural."¹⁵⁶

By contrast, the opinion sets out the jurisprudential premises upon which Anglo-American notions of criminal responsibility rest in language which is cathected with notions of enlightenment individualism.¹⁵⁷ Wright explains that punishment is appropriate only in those instances where blame for an untoward act fairly can be attributed to the "free will" of the offender. "Morally legitimate"

F.2d 442 (D.C. Cir. 1970) (*en banc*), had taken a tentative step in the direction of recognizing a loss-of-control excuse of this sort. In that case, the court observed that an addict's conduct in purchasing, possessing, and using narcotics is part of the disease of addiction itself. Building upon *Robinson*, it suggested, without deciding on the particular record before it, that either Congress did not intend to hold the nontrafficking addict criminally responsible for mere possession or, if it did, that such liability would be unconstitutional. See also *United States v. Sutton*, 346 F. Supp 464 (D.D.C. 1972) (indicating that defendant could challenge that part of his conviction that held him liable for being a non-trafficking addict); *United States v. Ashton*, 317 F. Supp 860 (D.D.C. 1970) (dismissing portion of charge covering possession of narcotics because no intent to traffic could be established). For a fuller discussion of the various opinions in the *Powell* case, see Greenawalt, *supra* note 150, at 930-35; Nemerson, *supra* note 6, at 421.

¹⁵³ Judge Wright's dissent was joined by Judges Bazelon, Tamm, and Robinson. See *Moore*, 486 F.2d at 1208 (Wright, J., dissenting).

¹⁵⁴ The opinion contains a lengthy historical section which chronicles the shifting lenses through which American society has viewed narcotic addiction since the turn of the century. Apparently, for years both the medical community and the criminal justice system have asserted expertise in and jurisdiction over the problem of addiction, although the relative influence of each sphere has fluctuated considerably over time. See *Moore*, 486 F.2d at 1215-29 (Wright, J., dissenting).

¹⁵⁵ *Id.* at 1229-35.

¹⁵⁶ *Id.* at 1230.

¹⁵⁷ For a good discussion of liberal individualism, see LACEY, *supra* note 60, at 144-46.

punishment requires culpability, and culpability is present only in the acts of a responsible moral agent—one who is possessed of the ability to choose between right and wrong.¹⁵⁸

Moreover, says Wright, a person's capacity to exercise choice, and the concomitant ability to produce behavior voluntarily, is essential to criminal guilt regardless of the penological goal identified in any particular prosecution. Thus, if an offender's liberty is to be infringed on retributive grounds,¹⁵⁹ it must be as a consequence of his or her desert; because, *a fortiori*, desert attaches only to wrongful conduct that is properly attributable to the will of the actor and not to some "disease" that has overcome his or her decision-making processes, punishment for conduct that is symptomatic of an illness is precluded.¹⁶⁰ Similarly, says Wright, where the goal is deterrence, even if punishment of an offender for conduct beyond his or her control may inhibit others who have not yet lost control, such a utilitarian exercise would involve treating the addict as a "mere vehicle through which to deter others," and would therefore be "inappropriate for society."¹⁶¹

Taken on its own terms, Wright's opinion presents a powerful argument for recognition of an addiction defense. In his conception, conduct is either the product of free choice, and on that basis subject to blame and punishment, or the result of a compulsion beyond the decision-making capacity of the actor, in which case treatment is indicated. Once the question is posed in this fashion, the considerable data adduced by Wright regarding the loss of

¹⁵⁸ See *Moore*, 486 F.2d at 1240-41 (Wright, J., dissenting). The central normative element of the loss-of-control defense adopted by Wright was the notion that blame—and, by extension, punishment—should only attach to conduct that is the product of an actor's free will. Consistent with this principle of responsibility, Wright suggested that the criminal law has long recognized a variety of excuses that exculpate defendants whose otherwise criminal conduct is in some sense involuntary. Because Wright was persuaded that possession and use of narcotics is involuntary conduct on the part of chemically-dependent defendants, he concluded that recognition of a new excuse was appropriate. See *id.* at 1241-42.

¹⁵⁹ Wright, however, displays considerable skepticism regarding this particular penological goal. See *id.* at 1243.

¹⁶⁰ See *id.* at 1242-43.

¹⁶¹ *Id.* at 1245. H.L.A. Hart's view that utilitarian theories of punishment must be bounded by normative principles of desert is directly relevant to Judge Wright's reasoning here. See HART, *supra* note 14, at 54-89. Wright goes on to make similar arguments with respect to specific deterrence, rehabilitation, and isolation. See *Moore*, 486 F.2d at 1245-47 (Wright, J., dissenting).

control suffered by addicts seems dispositive, at least as to the issue presented by the defendant Moore.

Two related conceptual difficulties lurk behind Judge Wright's formulation. On the one hand, because the logic of his approach depends upon an essential absence of choice on the part of the addicted offender with respect to conduct otherwise deemed criminal, Wright is forced to deny the possibility that volition and compulsion (or free will and determinism) can coexist, at least with respect to the use of addictive substances by chemically-dependent persons. On the other hand, given his reliance on a scientific conception of alcoholism and addiction¹⁶² that contains the predicates for relieving chemically-dependent offenders of criminal responsibility for much other conduct related to their disease in a more attenuated fashion, Wright must either allow for a fairly broad-sweeping new defense or arbitrarily limit the scope of his proposal to conduct such as possession, which can be described as "inherent in the disease itself."¹⁶³

Both of these difficulties received attention from Judge Wilkey in his concurring opinion. Wilkey, in voting to turn back Moore's effort to gain recognition for an addiction defense, constructs a schematic theory of choice and compulsion in order to illustrate his markedly different views regarding the way in which the behavior of chemically-dependent offenders is produced. In Wilkey's view, an addict's ability to control his or her activities is determined by two factors: "physical craving" and "strength of character."¹⁶⁴ In a rather mechanistic fashion, Wilkey explains that an addict with a "craving" that is more powerful than his or her "strength of character" will experience a loss of control, while another addict, whose "craving" is less than his or her "strength of character," will resist the temptations posed by the physical need to obtain or use drugs. In each instance, says Wilkey, "the legally important factor is the resulting loss [or maintenance] of self-control."¹⁶⁵

A likely premise of Wilkey's point of view is that an alcoholic or addict should be convicted and punished for criminal behavior even when it is the product of a drug-induced compulsion, not because desert attaches as a consequence of behavior per se, but because the actor's conduct has demonstrated his or her inadequate "strength

¹⁶² See *infra* text accompanying notes 224.

¹⁶³ *Moore*, 486 F.2d at 1255 (Wright, J., dissenting).

¹⁶⁴ *Id.* at 1145 (Wilkey, J., concurring).

¹⁶⁵ *Id.*

of character." Unfortunately, Wilkey provides neither a clear definition of the phrase "strength of character" nor an explanation of how one derives his or her "character" and how its "strength" is determined.¹⁶⁶ At most, Wilkey has simply split off the biochemical determinants of an addict's behavior from those which are psychosocial in nature.¹⁶⁷ Without more, it is difficult to see why the latter are any more deserving of blame and punishment than the former if, as Judge Wright asserts, freedom of choice is always an essential ingredient for assessing criminal responsibility.

In addition, Judge Wilkey fails to account for the probability that two persons with identical "strength of character" but different degrees of "physical craving" would be treated differently under his scheme. Smith, confronting a more severe craving, can be expected to engage in proscribed conduct (for example, narcotics possession), while Jones, whose craving is less severe, will presumably be able to resist it successfully. Even though the two would be indistinguishable in terms of blameworthiness (if, in fact, blameworthiness derives from "strength [or weakness] of character"), Smith, but not Jones, would be punished.

One solution to this difficulty, of course, is to say that it is conduct that determines culpability or blameworthiness:¹⁶⁸ Smith is to be punished because he has acted, and acted wrongfully; Jones is blameless because he has not. The problem with this response is that it fails to account for the criminal law excuses that are uncontroversially¹⁶⁹ granted to actors who exhibit certain traits

¹⁶⁶ Judge Wilkey does explain that "craving" is meant to refer to the physiological consequences of the interplay between a chemically-dependent person's biochemistry and the properties of a given substance. *See id.*

¹⁶⁷ For a fuller discussion of the elements comprising the "disease" of addiction, see *infra* notes 184-202 and accompanying text.

¹⁶⁸ All jurisdictions in the United States require an act or omission for criminal liability. In addition, the *Robinson* case stands, at the least, for the proposition that conduct, as opposed to status, is a constitutional requisite for criminal responsibility. *See supra* note 149.

¹⁶⁹ The recent trend toward creating a verdict of "guilty but mentally ill" suggests the presence of some measure of controversy in this area. In the early part of the 1980s a number of jurisdictions adopted statutory provisions allowing for this verdict. Beginning with Michigan in 1975, twelve states have adopted this approach, prompted in large part by the highly publicized case of John Hinckley. *See* ALASKA STAT. § 12.47.030 (Supp. 1984); DEL. CODE ANN. tit. 11, § 408 (Supp. 1986); GA. CODE ANN. § 17-7-131 (Michie Supp. 1986); ILL. ANN. STAT. ch. 38, para. 115-2(b) (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-36-2-3 (Burns 1985); KY. REV. STAT. ANN. § 504.120 (Baldwin 1986); MICH. COMP. LAWS ANN. § 768.36 (West 1982); N.M. STAT. ANN. § 31-9-3 (Michie 1984); 18 PA. CONS. STAT. ANN. § 314 (1983); S.C. CODE ANN. § 17-24-20 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-7-2 (Supp. 1986);

even though unrelated to conduct, such as infant offenders and those with severe psychiatric disorders.¹⁷⁰ Unless one's view is that culpability requires only *some* freedom of choice, in which case the deterministic element is simply being pushed further below the surface, a way out of the dilemma must be sought that introduces considerations beyond those discussed thus far.¹⁷¹

UTAH CODE ANN. § 77-13-1 (Supp. 1986). What is significant about this "GBMI Movement," is that it allows a defendant simultaneously to be adjudged criminally liable and not responsible. See Bradley D. McGraw, et al., *The "Guilty But Mentally Ill" Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117, 121 (1985). The GBMI verdict has been strongly criticized by scholars as conceptually flawed and procedurally problematic. Constitutional challenges have been numerous, although GBMI statutes have withstood both state and federal constitutional attack on equal protection and due process grounds. See McGraw, et al., *supra*, at 148-54. Significantly, however, the movement seems to have stalled, and there has been little new legislative or judicial initiative in those states that did not develop "GBMI" verdicts by 1986. This suggests the continuing viability of the traditional principle of responsibility, at least in some form.

Even so, it is fair to say that the sorts of excuses referred to here are firmly established features of our criminal law, their continued validity not the focus of any serious disagreement.

¹⁷⁰ See *supra* note 71.

¹⁷¹ Faced, on the one hand, with Wright's principle of responsibility and, on the other, with a causal theory of addiction, Wilkey saw clearly that efforts to cabin the determinist force of the proposed loss-of-control defense were unlikely to succeed, and that "the relentless advance of a method of inquiry . . . that dismisses the explanatory value of individual free will and responsibility" might well undermine the very foundations of the criminal law. Weinreb, *supra* note 4, at 63. To avoid this result, Wilkey undertook not a factual assault on the reliability of Moore's medical evidence, but a questioning of the normative premise upon which his legal claim rested, the causal theory of excuse. See *Moore*, 486 F.2d at 1147-48 (Wilkey, J., voting to affirm all convictions and the sentences in the District Court).

In dismissing a causal theory of responsibility, however, Wilkey may have created more problems than he solved. In the first place, it is elementary that retributive notions of desert rest upon the principle that autonomous choice must accompany blame, and Wilkey nowhere suggested that he was willing to rely upon purely utilitarian theories of punishment to ground the criminal law's system of sanctioning untoward conduct. For a good example of a purely utilitarian theory of punishment, see Morris N. Eagle, *Responsibility, Unconscious Motivation, and Social Order*, 6 INT'L J.L. & PSYCHIATRY 263 (1983). For a more general discussion of the role of utilitarianism within the criminal law, see HART, *supra* note 14, at 158-85. In addition, the simple removal of the free will requirement does not seem to comport with certain basic doctrinal features of the criminal law, such as the voluntary act requirement, see, e.g., MODEL PENAL CODE § 2.01(1) (1962), or the fairly extensive range of excuses that are present in the common law and most jurisdictions' penal codes; see, e.g., MODEL PENAL CODE § 2.09 (1962) (duress); *id.* § 4.01 (mental disease or defect excluding responsibility).

Rather, it would seem that, in order to maintain both the structure of established doctrine and the moral underpinnings of the system, resolution of the dilemma requires either a redefinition of the responsibility principle itself or some alternative conception of blame and desert. At this point in the analysis, of course, a theory of

Writing for two members of the majority, Judge Leventhal broadens the discussion to include factors beyond this tight nexus of choice, compulsion, and blame. Leventhal's opinion examines the long-recognized criminal law defenses of duress and insanity, and concludes that both are distinguishable from the proposed alcoholism/addiction defense in terms of evidentiary reliability. He points out that the excuse of duress is "inapplicable to a purely internal psychic incapacity," and requires proof that the defendant was compelled to act *by some other person*.¹⁷² Because the source of this sort of compulsion is external to the defendant, and therefore observable, Leventhal implies that it is more obviously suitable to proof by way of ordinary testimonial evidence.

With respect to the insanity defense, Judge Leventhal makes much of the fact that all of the acknowledged doctrinal formulations require proof of some mental disease or defect, as well as evidence of a link between that psychiatric impairment and the defendant's cognitive or volitional incapacity. In a matter of several pages, Leventhal twice quotes a passage from the commentary to the Model Penal Code to the effect that the criminal law "cannot vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect that may establish irresponsibility."¹⁷³ Leventhal's analysis builds upon his earlier opinion in *United States v. Brawner*,¹⁷⁴ in which the D.C. Circuit declined to accept "an all-embracing unified field theory"¹⁷⁵ which would have exculpated "anyone whose capacity for control is insubstantial."¹⁷⁶ Leventhal explains that expert testimony as to "the consequences generally attendant on the kind of mental illness

responsibility based upon practical reasoning comes into play.

¹⁷² *Moore*, 486 F.2d at 1180 (Leventhal, J., concurring). Of course, the actor's ability to resist the compulsion (his or her "strength of character") is still legally relevant, and measured in most jurisdictions by way of an objective standard of reasonableness. See, e.g., MODEL PENAL CODE § 2.09(1) (Proposed Official Draft 1962) (providing that the defense of duress is available only if "a person of reasonable firmness" in the defendant's situation would have been unable to resist the coercion).

¹⁷³ *Moore*, 486 F.2d at 1180 (Leventhal, J., concurring) (quoting MODEL PENAL CODE § 2.09 commentary at 6 (Tent. Draft No. 10, 1960)). Judge Leventhal quotes a portion of this passage again. See *id.* at 1184.

¹⁷⁴ 471 F.2d 969 (D.C. Cir. 1972).

¹⁷⁵ *Id.* at 995.

¹⁷⁶ *Moore*, 486 F.2d at 1181.

involved"¹⁷⁷ is necessary before a judge or jury can parse the crucial legal distinction "between incapacity and indisposition, between those who can't and those who won't, between the impulse irresistible and the impulse not resisted."¹⁷⁸

In essence, Leventhal rejects the proposed addiction defense because he believes an offender's loss of control or involition should only become relevant in figuring his or her criminal responsibility when it results from an external force or a psychiatric disease that is both "gross and verifiable."¹⁷⁹ Leventhal carves out this seemingly manageable rule because he is sensitive to the difficulties inherent in distinguishing "between those who can't and those who won't," and because he is concerned about what he sees as the circular nature of the diagnostic criteria commonly employed to identify addictions.¹⁸⁰ This circularity, he suggests, stems from the fact that a chemically-dependent person is defined simply as one who has lost the ability to control his or her use of an addictive substance. Yet this formulation lacks "criteria external to the actions which it is invoked to excuse."¹⁸¹ Leventhal thus concludes that there is no way for the adjudicative process to distinguish between those substance abusers who have acted involuntarily and those who have acted culpably.¹⁸²

¹⁷⁷ *Id.* at 1182 n.80.

¹⁷⁸ *Id.* at 1182 (footnote omitted).

¹⁷⁹ *Id.* at 1184 (quoting MODEL PENAL CODE § 2.09 commentary at 6 (Tent. Draft No. 10, 1960)).

¹⁸⁰ *See id.* at 1185.

¹⁸¹ *Id.* at 1184.

¹⁸² Unfortunately, this attempt by Judge Leventhal to resolve the antinomy between determinism and intentionalism in cases of addiction or alcoholism is not persuasive. It simply is not credible to assert that a chemically-dependent person's behavior is the product solely of his or her free will. Although Leventhal seemed to be troubled by the circularity of the diagnostic criteria employed in this area, it is difficult not to credit the findings of clinicians that a chemically-dependent patient's genetic, biochemical, and environmental background contribute significantly to his or her illness. On the "medical model of addiction," see *infra* text accompanying notes 184-202.

More importantly, Leventhal's efforts to draw a factually-derived line between categories of conduct to which he would apply a causal account (for example, duress and insanity) and those as to which he would refuse such a description (for example, chemical dependency) cannot succeed because, at root, *all* human behavior is determined by antecedent factors not properly subsumed within traditional notions of free choice. This claim is axiomatic and definitional rather than empirical. *See supra* note 1.

The problem, in short, is not factual but conceptual. Determinism, "the doctrine that every event, including human actions and willings, has a cause," Moore, *supra* note 4, at 1112, must be true as an objective account of our universe because

B. *The Debate Over Chemical Dependency as a Disease*

Judge Leventhal's approach to the problem of chemical dependence and criminal responsibility proceeds from his view that incapacity and indisposition can be distinguished in the law through the use of medical evidence. This position turns on a particular understanding of what constitutes an illness. Much has been written about the "disease model" of alcoholism and drug addiction.¹⁸³ Given Leventhal's reliance on the disease model as it relates to other psychiatric conditions, it is worth examining the contours of this literature in order to unpack the claims he makes regarding the distinguishability of diseases which qualify as excuses in the criminal law from those which do not.

its opposite, indeterminism, is so obviously flawed as a matter of basic metaphysics. While there has been a continuing debate among physicists on this point, with some arguing for a theory of essential randomness—see e.g., ERNST CASSIRER, DETERMINISM AND INDETERMINISM IN MODERN PHYSICS: HISTORICAL AND SYSTEMATIC STUDIES OF THE PROBLEM OF CAUSALITY (O. Theodor Benfey trans., 1956)—all seem to agree that causation enters the picture at some point in the process leading to events in the physical world.

In any case, human actors generally experience themselves and others as the authors of their own actions. Choice and free will, in other words, represent our subjective experience of daily reality. See Knight, *supra* note 1, at 255. Therefore, while Judges Wright and Leventhal may have been correct in urging the criminal law to employ one perspective (the subjective intentionalist account) in most instances and to save the other (the objective causal account) for cases where responsibility should not attach, they both were mistaken in their efforts to identify a factual basis for the mechanism by which that shifting perspective is to be mediated.

¹⁸³ Perhaps the classic description of the disease model is contained in E.M. JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* (1960). For further information on the disease model as it relates to alcoholism, see MARTY MANN, *NEW PRIMER ON ALCOHOLISM* (1958); Blume, *supra* note 90; Stanley E. Gitlow, *Alcoholism: A Disease*, in *ALCOHOLISM: PROGRESS IN RESEARCH AND TREATMENT* 1 (Peter G. Bourne & Ruth Fox eds., 1973); Mark Keller, *The Disease Concept of Alcoholism Revisited*, 37 Q.J. STUD. ALCOHOL 1694 (1976); Norman E. Zinberg, *Alcohol Addiction: Toward a More Comprehensive Definition*, in *DYNAMIC APPROACHES TO THE UNDERSTANDING AND TREATMENT OF ALCOHOLISM* 97 (Margaret H. Bean & Norman E. Zinberg eds., 1981). For a similar perspective on drug addiction, see Nathan B. Eddy et al., *Drug Dependence: Its Significance and Characteristics*, 32 BULL. WORLD HEALTH ORG. 721 (1965); Jerome H. Jaffe, *Drug Addiction and Drug Abuse*, in *PHARMACOLOGICAL BASIS OF THERAPEUTICS* 285 (Alfred G. Gilman et al. eds., 8th ed., 1990).

1. The "Disease Model" of Addiction and Alcoholism

While there is considerable terminological confusion regarding addiction to, and abuse of, alcohol and other drugs,¹⁸⁴ stable diagnostic models do exist, and are widely accepted. Alcoholism, for example, has been recognized as a medical disorder since 1951 by the World Health Organization.¹⁸⁵ Similarly, the American Psychiatric Association has, since 1953, included alcoholism in every edition of its *Diagnostic and Statistical Manual of Mental Disorders*.¹⁸⁶

Much remains to be learned about alcohol abuse and alcohol dependence. Nevertheless, a review of the literature does yield a rather coherent picture. It is clear, for example, that drinking does not inexorably lead to alcoholism. Although estimates put the

¹⁸⁴ See *supra* note 5.

¹⁸⁵ See WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF DISEASES 198 (9th rev., vol. 1, 1977) (setting forth the features of "alcohol dependence syndrome").

¹⁸⁶ See AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 173-75 (3d ed. rev. vol. 1987) [hereinafter DSM-III-R] (defining alcohol dependence and alcohol abuse). A widely employed definition of alcoholism has been jointly formulated by the National Council on Alcoholism and the American Medical Society on Alcoholism. This definition provides that:

Alcoholism is a chronic, progressive, and potentially fatal disease. It is characterized by tolerance and physical dependency or pathologic organ changes, or both—all the direct or indirect consequences of the alcohol ingested.

1. "Chronic and progressive" means that the physical, emotional, and social changes that develop are cumulative and progress as drinking continues.

2. "Tolerance" means brain adaptation to the presence of high concentrations of alcohol.

3. "Physical dependency" means that withdrawal symptoms occur from decreasing or ceasing consumption of alcohol.

4. The person with alcoholism cannot consistently predict on any drinking occasion the duration of the episode or the quantity that will be consumed.

5. Pathologic organ changes can be found in almost any organ, but most often involve the liver, brain, peripheral nervous system, and the gastrointestinal tract.

6. The drinking pattern is generally continuous but may be intermittent, with periods of abstinence between drinking episodes.

7. The social, emotional, and behavioral symptoms and consequences of alcoholism result from the effect of alcohol on the function of the brain. The degree to which these symptoms and signs are considered deviant will depend upon the cultural norms of the society or group in which the person lives.

number of alcoholics in the United States at between nine and ten million, the best data suggest that this represents only about 5% to 10% of all those who begin drinking socially.¹⁸⁷

Typically, alcoholism emerges over an extended period of time. As it progresses, the drinker gradually becomes physically dependent on alcohol. Many alcoholics, for example, develop an increasing tolerance to the substance, which drives them to ingest larger and larger amounts.¹⁸⁸ In addition, a number experience anxiety, nausea, and nervous system disorders upon its withdrawal.¹⁸⁹

The alcoholic's dependence, however, does not derive solely from his or her physiological reaction to alcohol. Experts also describe a psychological component known as "alcoholic denial," which is "a clinical phenomenon . . . so widely assumed that researchers do not even investigate its presence in most samples."¹⁹⁰ One practitioner has explained that:

[d]enial is an unconscious mental mechanism (unlike lying) by which an individual protects himself from recognizing his increasing need for alcohol and from being aware of the often-devastating (sic) consequences of its use. Denial is a primitive defense mechanism that all people have and may regress to in order to safeguard themselves against the recognition of something which is threatening to their well-being Denial is a universal characteristic of alcoholism, and is inevitably present in the alcoholic.¹⁹¹

Taken together, the physical compulsion resulting from tolerance and withdrawal and the psychological consequences of denial lead alcoholics to a state in which they are unable to regulate their drinking. This inability (or impaired ability) of the individual

¹⁸⁷ See Criteria Committee, National Council on Alcoholism, *Criteria for the Diagnosis of Alcoholism*, AM. J. PSYCHIATRY, Aug. 1972, at 127, 128.

¹⁸⁸ See Michael J. Walsh, *The Biochemical Aspects of Alcoholism*, in ALCOHOLISM: PROGRESS IN RESEARCH AND TREATMENT, *supra* note 183, at 43, 44-51.

¹⁸⁹ See Maurice Victor & Sidney M. Wolfe, *Causation and Treatment of the Alcohol Withdrawal Syndrome*, in ALCOHOLISM: PROGRESS IN RESEARCH AND TREATMENT, *supra* note 183, at 137, 140-41.

¹⁹⁰ Nemerson, *supra* note 6, at 407.

¹⁹¹ Brief of the National Council on Alcoholism at 20-21, *Traynor v. Turnage*, 485 U.S. 535 (1988) (Nos. 86-737 & 86-622) [hereinafter Brief of the National Council on Alcoholism] (quoting from the affidavit of Dr. Ann Geller); see also Margaret H. Bean, *Denial and the Psychological Complications of Alcoholism*, in DYNAMIC APPROACHES TO THE UNDERSTANDING AND TREATMENT OF ALCOHOLISM, *supra* note 183, at 55.

to control his or her drinking, we are told, is the central definitional feature of alcoholism.¹⁹²

The question why some drinkers, including some heavy drinkers, retain the ability to regulate their consumption of alcohol while others develop a loss of control has received considerable attention from research physicians and social scientists.¹⁹³ This research has revealed that the disease is produced by a shifting confluence of genetic/biochemical, environmental, and sociocultural factors.¹⁹⁴ Research on the genetic component has provided strong evidence that there is an inherited predisposition to developing alcoholism, and individuals with a family history of alcohol abuse or dependence have been found to be at great risk of developing the disease.¹⁹⁵

¹⁹² See, e.g., Mark Keller, *Definition of Alcoholism*, 21 Q. J. STUD. ALCOHOL 125, 128 (1960) (explaining that "loss of control" is the sine qua non of alcoholism); Brief of the National Council on Alcoholism, *supra* note , at 20 (describing alcoholism as "something over which . . . [the alcoholic drinker] is [un]able to exercise conscious control").

¹⁹³ For a good overview of this research, see Bruce Bower, *Alcoholism's Elusive Genes*, 134 Science News 74 (1988); Bruce Bower, *Intoxicating Habits*, 134 SCI. NEWS 88 (1988).

¹⁹⁴ See SHELDON ZIMBERG, *THE CLINICAL MANAGEMENT OF ALCOHOLISM* (1982).

¹⁹⁵ In 1970, a family study in St. Louis was conducted on 259 hospitalized alcoholics. Researchers interviewed first-degree relatives (parents, children, siblings) of the alcoholic patients and found that 50% of the male first-degree relatives were also alcoholic. See George Winokur et al., *Alcoholism: III. Diagnosis and Familial Psychiatric Illness in 259 Alcoholic Proband*s, 23 ARCHIVES GEN. PSYCHIATRY 104 (1970). Another study focused on half-siblings, and made comparisons between children of alcoholic parents and children without an alcoholic parent who were raised in foster homes with an alcoholic parent figure. In each instance, the relative influence of having a biologic alcoholic parent as opposed to having lived with an adoptive alcoholic parent figure predominated in relation to the development of alcoholism. See Marc A. Schuckit et al., *A Study of Alcoholism in Half Siblings*, 128 AMER. J. PSYCHIATRY 1132 (1972).

Although research on the genetic component of alcoholism has not been able to determine precisely what it is in an individual's genetic makeup that predisposes him or her to the disease, see Bower, *Alcoholism's Elusive Genes*, *supra* note 193; Bower, *Intoxicating Habits*, *supra* note 193, there is evidence that physical abnormalities in the way these individuals metabolize alcohol may play a role. See Marc A. Schuckit & Vidamantas Rayeses, *Ethanol Ingestion: Differences in Blood Acetaldehyde Concentrations in Relatives of Alcoholics and Controls*, 203 SCI. 54 (1979). This theory is currently being investigated to understand more fully the biochemical nature of alcoholism. See Donald W. Goodwin, *Alcoholism and Heredity: Update on the Implacable Fate*, in ALCOHOL, SCIENCE AND SOCIETY REVISITED 162 (Edith L. Gomberg et al. eds., 1982).

It is important to note that most of the research on alcoholism that has been undertaken over the years has involved male subjects. Recent studies suggest that the risk factors and progression of the disease for women may be quite distinct from those identified for men. See Linda J. Penniman & Jacqueline Agnew, *Women, Work and Alcohol: State of the Art Reviews*, 4 OCCUPATIONAL MED. 263 (1989).

In addition, an individual's environmental and sociocultural background are also thought to contribute to the development of alcoholism. For example, in societies where drinking is socially accepted, biologically predisposed individuals tend to be vulnerable to the disease, while in societies which encourage total abstinence from alcohol, alcoholism is relatively rare.¹⁹⁶

The literature presents a similar clinical picture of other forms of substance abuse and dependence, including narcotics addiction. Here again, professional organizations such as the American Psychiatric Association¹⁹⁷ and the World Health Organization¹⁹⁸ have long recognized drug addiction as a diagnosable and treatable illness.

As with alcohol, only a subset of those who use narcotics ultimately become dependent and fall into a compulsive pattern of abuse.¹⁹⁹ With respect to those users who do develop an addiction, the pattern closely resembles that described for alcoholism. Thus, a gradually increasing physical dependence driven by the twin engines of tolerance and withdrawal, along with the psychological effects of denial, render the drug addict incapable of controlling his or her ingestion of the substance.²⁰⁰

¹⁹⁶ See ZIMBERG, *supra* note 194, at 12-14. Significant differences have been found to exist as well between ethnic and religious groups within a single culture. See *id.*

¹⁹⁷ See DSM-III-R, *supra* note 186, at 177-79 (cocaine dependence), 182-83 (opioid dependence).

¹⁹⁸ See WORLD HEALTH ORG. EXPERT COMM. ON ADDICTION-PRODUCING DRUGS, WORLD HEALTH ORGANIZATION TECHNICAL REPORT SERIES NO. 273, THIRTEENTH REPORT, at 13 (1964).

¹⁹⁹ See Beryl A. Gerber, *Non-Dependent Drug Use: Some Psychological Aspects*, in SCIENTIFIC BASIS OF DRUG DEPENDENCE 375 (Hannah Steinberg ed., 1969); Denis Hill, *Chairman's Introduction*, in SCIENTIFIC BASIS OF DRUG DEPENDENCE, *supra*, at 288.

²⁰⁰ Judge Wright in the *Moore* case cites the World Health Organization's definition of heroin addiction as "[t]he most widely accepted and authoritative definition." *United States v. Moore*, 486 F.2d 1139, 1229 (D.C. Cir. 1973) (Wright, J., dissenting). That definition lists the following characteristics:

- (1) an overpowering desire or need to continue taking the drug and to obtain it by any means; the need can be satisfied by the drug taken initially or by another with morphine-like properties; (2) a tendency to increase the dose owing to the development of tolerance; (3) a psychic dependence on the effects of the drug related to a subjective and individual appreciation of those effects; and (4) a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinence syndrome when the drug is withdrawn.

Id. (quoting WORLD HEALTH ORG. EXPERT COMM. ON ADDICTION-PRODUCING DRUGS, *supra* note 198, at 13). The DSM-III-R indicates that withdrawal may not apply to the abuse of or dependence upon cannabis, hallucinogens, or phencyclidine (PCP). See

Theories as to the etiology of drug addiction also parallel those developed in the alcoholism area. There may be no single universally accepted account of the causes of drug abuse and dependence,²⁰¹ but most experts do recognize that a complex process of genetic, biochemical, psychological and cultural factors is at work.²⁰² To be sure, slightly different elements are thought to be present, depending upon the type of substance to which a given individual is addicted. All the same, the alcoholic or addict is almost always presented as suffering from a diagnosable illness caused not by his or her simple choice, but by factors beyond the individual's conscious control.

2. Criticisms of the "Disease Model"

Given this understanding of the etiology and progression of alcoholism and drug addiction, and given the medical community's acceptance of these conditions as diseases, Judge Leventhal's claim as to the evidentiary unreliability of Moore's proposed addiction defense²⁰³ would seem to be unpersuasive. Nevertheless, other commentators who have focused on the relationship between medical and legal notions of responsibility have come to a similar conclusion. Perhaps the most forceful spokesperson for the view that recognition of a medicalized conception of addiction should not be allowed to undermine the criminal responsibility of addicts and alcoholics is Herbert Fingarette.²⁰⁴

In much of his work in this area, Fingarette has taken on the notion (or as he describes it, the "myth"²⁰⁵) that alcoholism and

DSM-III-R, *supra* note 186, at 176-77, 179, 183; *see also* Joan E. Zweben & J. Thomas Payte, *Methadone Maintenance in the Treatment of Opioid Dependence*, 152 W. J. MED. 5 (1990) (describing the use of methadone as a substitute for heroin and to prevent withdrawal).

²⁰¹ *See* Fingarette, *supra* note 5, at 433-43.

²⁰² *See* Zweben & Payte, *supra* note 200, at 589-90; *see also* WORLD HEALTH ORG. EXPERT COMM. ON DRUG DEPENDENCE, WORLD HEALTH ORGANIZATION TECHNICAL REPORT SERIES NO. 775, TWENTY-FIFTH REPORT (1989) (offering a collection of the scientific literature on drug dependence).

²⁰³ *See supra* text accompanying notes 179-181.

²⁰⁴ *See* HERBERT FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE* (1988) [hereinafter FINGARETTE, *HEAVY DRINKING*]; Fingarette, *supra* note 5; Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism"*, 83 HARV. L. REV. 793 (1970) [hereinafter Fingarette, *Perils*]. For a more general presentation of Fingarette's views regarding individual autonomy, *see* HERBERT FINGARETTE, *THE SELF IN TRANSFORMATION: PSYCHOANALYSIS, PHILOSOPHY, AND THE LIFE OF THE SPIRIT* (1963).

²⁰⁵ Fingarette's subtitle to his most recent book—"The Myth of Alcoholism as a

drug addiction are diseases. To a significant extent, this debate turns on semantics, especially with respect to different definitions of the terms "disease" and "addiction."²⁰⁶ Considerably more interesting are Fingarette's views regarding the lack of volition or free choice claimed by alcoholics and addicts as grounds for their exculpation from criminal responsibility. Fingarette's argument proceeds in several steps, and each is worth independent consideration.

First, assuming that alcoholism and addiction are diseases, Fingarette asserts that not all phenomena associated with diseases can "be usefully adapted to the context of a legal argument."²⁰⁷ All too often, commentators, judges and lawyers who have pressed for recognition of a loss-of-control defense for chemically-dependent defendants have limited themselves to arguing that conduct which is "part of" or "symptomatic of" a disease is not culpable and therefore ought not be subject to punishment.²⁰⁸ Fingarette properly points out that this sort of truncated argument is obviously correct only insofar as it relates to behavior which is involuntary and not the product of the actor's autonomous will.²⁰⁹

Of course, those arguing for recognition of a new addiction defense draw an important inference: that behavior inexorably

Disease"—is evidence of Fingarette's commitment to his position. FINGARETTE, *HEAVY DRINKING*, *supra* note 204.

²⁰⁶ See, e.g., Fingarette, *supra* note 5, at 420-22 (arguing that a lack of consensus about the meaning of the terms "disease" and "addiction" make the claim that addiction is a disease unsuitable as a premise in the argument for legal reform). See also *infra* text accompanying notes 230-30.

²⁰⁷ Fingarette, *supra* note 5, at 420.

²⁰⁸ See, e.g., *Watson v. United States*, 439 F.2d 442, 470 (D.C. Cir. 1970) ("The use and incidental possession of narcotics are invariable symptoms of addiction."); *Powell v. Texas*, 392 U.S. 514, 569 (1968) (Fortas, J., dissenting) ("[A] person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease."); cf. *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

²⁰⁹ Fingarette acknowledges that "autonomous somatic states" and "autonomous mental phenomena," or what the *Robinson* majority calls the "status" of being an addict, 370 U.S. at 666, are beyond punishment as a constitutional matter. See Fingarette, *supra* note 5, at 422. There is considerably less certainty about the constitutionality of punishing an individual for the "condition" of being under the influence of intoxicants. See, e.g., *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion) (holding that criminal punishment for public intoxication does not violate the Eighth Amendment); cf. *State ex rel. Harper v. Zegeer*, 296 S.E.2d 873 (W. Va. 1982) (holding that criminal punishment for public intoxication violates state constitution's prohibition against cruel and unusual punishment).

related to an illness or disease necessarily emanates from causal factors distinct from or beyond the person of the actor.²¹⁰ It is at this point—where involution and disease coincide—that Fingarette's formulation of the problems generates its greatest leverage. He drives a wedge between the notions of disease and involution by asserting that "[t]here is no reason to assume that whatever is a medically recognized symptom must be legally involuntary. A symptom is simply an indicator or manifestation of disease."²¹¹

Once he has separated the concepts of involution and disease, the next step in Fingarette's formulation is to attack the loss-of-control thesis that is so elemental to his opponents' point of view. To accomplish this, he identifies a number of "aspects of drug use that belie th[e] myth [of loss of control]."²¹² The first is that many users of narcotics and alcohol manage to avoid addiction altogether,²¹³ a fact that presumably leads Fingarette to the conclusion that there is something about the addicted individual—his or her character or personality—that contributes to his or her abuse of, and dependence upon, drugs or alcohol.²¹⁴ Next, Fingarette argues that many former addicts and alcoholics are able to alter their patterns of behavior and give up the use of drugs and alcohol, either through treatment or self-help.²¹⁵ The conclusion he wishes to draw here is that addicts do not suffer from a complete loss of control, because a significant number are able to exercise choice in overcoming their reliance;²¹⁶ in fact, he reports, the principal methodology for treatment of addictions and alcoholism

²¹⁰ See Blume, *supra* note 90, at 473-74; cf. Patricia M. Wald, *Judicial Activism in the Law of Criminal Responsibility: Alcohol, Drugs, and Criminal Responsibility*, 63 GEO. L.J. 69, 84-85 (1974) (arguing that, regardless of medical uncertainties, a jury ought to be empowered to decide in individual cases whether an alcoholic or addicted defendant was unable to resist committing the crime).

²¹¹ Fingarette, *supra* note 5, at 423.

²¹² *Id.* at 428.

²¹³ *Id.*

²¹⁴ Significantly, the same data are cited by advocates of the disease model to show that the addict or alcoholic is not responsible for developing his or her addiction. In these accounts, genetic and environmental factors that vary from person to person, and are beyond an individual's conscious control, are identified as determinative. See *supra* text accompanying notes 184-202.

²¹⁵ See Fingarette, *supra* note 5, at 429.

²¹⁶ See FINGARETTE, HEAVY DRINKING, *supra* note 204, at 59 (finding that "abundant studies show that drinkers who suffer physical symptoms of withdrawal will often, and of their own volition, refrain from drinking").

involves reinforcing the responsible decision-making capacity of patients.²¹⁷

Perhaps the most important point, however, is Fingarette's view that physiological addiction (especially as it relates to the joint phenomena of tolerance and withdrawal) is a less powerful determinant of addictive behavior than what he terms the "widespread influence of social and psychological inducements."²¹⁸ While the data on this last point are subject to a variety of interpretations,²¹⁹ its accuracy as an empirical matter is far less critical than the assumptions it reveals as to Fingarette's view of human nature.

In a curious way, Fingarette returns us to Judge Wilkey's formulation of addictive behavior as a product of the interplay between an addict's "physical craving" and his or her "strength of character."²²⁰ Wilkey argued that even if physiological determinants of behavior are beyond the scope of the criminal law's blaming practices, the forces that go to make up an actor's "character" are not. Fingarette takes a further step in this direction by suggesting that virtually all behavior, including that undertaken in conjunction with powerful physiological processes like exhaustion or hunger, is mediated by the mind and reflects "considerations of reasons and preferences."²²¹ In Fingarette's view, this operation of the actor's capacity to consider preferences and alternatives, which is present even in the case of an addicted or alcoholic individual, makes him or her a responsible moral agent.²²² Moreover, to the extent that these rational calculations are influenced by the actor's environment, holding a substance abuser responsible for his or her behavior becomes an "effective tool" in deterring future drug and alcohol use.²²³

²¹⁷ See *id.* at 109-11; Fingarette, *Perils*, *supra* note 204, at 806-07.

²¹⁸ Fingarette, *supra* note 5, at 428; see generally *id.* at 431-33. Indeed, Fingarette's reconceptualization of the problem asserts that "heavy drinking" is a "way of life." FINGARETTE, *HEAVY DRINKING*, *supra* note 204, at 99.

²¹⁹ Compare the authorities cited in Fingarette, *supra* note 5, at 431-32 with those cited *supra* note 195.

²²⁰ See *supra* text accompanying notes 164-64.

²²¹ Fingarette, *supra* note 5, at 435.

²²² Note the strong affinity between Fingarette's characterization and Michael Moore's revised principle of responsibility. See *supra* text accompanying notes 69-79.

²²³ See Fingarette, *supra* note 5, at 432.

3. The Fundamental Incompatibility of Medical and Legal Models of Behavior

Ultimately, commentators like Fingarette and advocates of the "disease model" find themselves in a standoff because they bring to the question of how human behavior is produced radically different notions of causation and choice. In general, the medical and behavioral sciences assume that events are determined by a combination of antecedent conditions or causes that make them inevitable. This scientific viewpoint holds that whenever something happens it could not have been possible for it to have failed to occur, given the unique set of antecedent factors that produced it.²²⁴ Within this deterministic perspective the concepts of "free will" and "volition" are simply meaningless. When a person finds himself or herself in a situation where alternative courses of conduct appear available, the scientific viewpoint asserts that the actor's "choice" is determined by the complex of antecedent factors that go to make up that individual's unique genetic, biological, and experiential history.²²⁵

Seymour Halleck has described the predominance of this determinist perspective within the medical profession, providing a useful summary of the divergent assumptions and goals that separate legal and medical models of responsibility and excuse giving.²²⁶ Halleck explains that the determinist cast of the medical model leads it to employ a fundamental utilitarianism in which considerations of desert rarely, if ever, enter into a doctor's treatment plan.²²⁷ The legal model, by contrast, assumes that human actors possess the capacity to choose to engage in or refrain from untoward conduct. In the legal realm, free will is presumed, and only extremely limited opportunities are afforded for rebutting

²²⁴ According to this model, no event can occur in defiance of the scientific laws of nature. Such an event, if it were to occur, would be a miracle.

²²⁵ For a definition of determinism, see *supra* note 1. With respect to the criminal law's practice of distinguishing between uncoerced conduct and that which is compelled (including, for example, acts undertaken at gunpoint), some determinists might argue that both categories of behavior are caused, but that conduct within the latter category is easier to predict because its determinative antecedents are so clearly observable. In this sense, all "choices" are determined, but the ones that are excused are those most obviously related to the actor's abnormal physiology or unusual reinforcement history. For one account of this sort of "ignorance determinism," see Moore, *supra* note 4, at 1118-19.

²²⁶ See Seymour Halleck, *Responsibility and Excuse in Medicine and Law: A Utilitarian Perspective*, LAW AND CONTEMP. PROBS., Summer 1986, at 127.

²²⁷ See *id.* at 129.

this presumption.²²⁸ Significantly, the legal model is oriented toward assigning blame and imposing punishment. This process is normative in the sense that punishment ordinarily requires desert, and even the criminal law's more utilitarian goals of deterrence, isolation, and reformation tend to be circumscribed by some conception of the offender's culpability.²²⁹

At the operational level, physicians make calculations as to a patient's responsibility by utilizing diagnostic criteria that go to define various illnesses.²³⁰ Halleck reports that doctors understand disease "to be present when a biological deficit is demonstrable."²³¹ In most cases, medical science can demonstrate the presence of a physical abnormality in a diseased patient through the use of clinical tests such as x-rays, blood tests and the like. Psychiatric disorders, however, do not always lend themselves to this sort of direct proof, and frequently are diagnosed on the basis of abnormal or deviant behavior.²³²

The fact that psychiatric disorders are principally discernable through their behavioral component, and that they may be influenced by environmental factors ordinarily thought of as "under [the] control of the will,"²³³ does lead many clinicians to experience a sort of ambivalence when withholding responsibility and blame, which may not be present when treating other patients presenting more "traditional" illnesses.²³⁴ This division between patients who are physically ill and those who are mentally ill has begun to break down, however, as new evidence accumulates associating virtually all psychological disorders with some biological abnormality.²³⁵ In addition, the current trend toward identifying a behavioral component in many physical illnesses has made it increasingly difficult for physicians to adhere rigidly to the view that

²²⁸ See Jules B. Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377, 395 (1987).

²²⁹ See Halleck, *supra* note 226, at 128-29.

²³⁰ See *id.* at 129.

²³¹ *Id.* at 133; see also Gerard, *supra* note 228, at 380-82.

²³² See Halleck, *supra* note 226, at 133. Gerard points out that a similar process of drawing inferences from behavior takes place on a regular basis within the criminal law. See Gerard, *supra* note 228, at 405.

²³³ Halleck, *supra* note 226, at 133.

²³⁴ See *id.* at 133, 138; see also RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 235-73, 337-81 (1986) (presenting and defending detailed theories of autonomy and coercion for determining patients' abilities to make responsible choices).

²³⁵ See Halleck, *supra* note 226, at 133.

disease "happens to someone," and thereby absolves him or her of responsibility.²³⁶

The ambivalence experienced by treatment professionals is not surprising given that they also live in a secular (that is, nonprofessional) environment in which blame and responsibility are ascribed to all sorts of daily behavior. Regardless of one's professional socialization, the everyday assumptions about choice and fault that are deeply inscribed in our culture remain powerfully present for each of us.²³⁷ In its pure form, however, the medical model not only avoids the ascription of responsibility for behavior that is biologically determined, but also for behavior that the secular culture (and the legal system) would describe as the product of the actor's free will.

In summary, it is probably accurate to assert that the health care system is dominated by a determinist perspective, whereas the criminal law is dominated by—indeed, is central in the construction of—an intentionalist perspective. Taking this distinction seriously has the potential for yielding some powerful guidance to those advocating on behalf of persons who are chemically-dependent. The claim that addicted or alcoholic defendants should be entitled to a loss-of-control defense in criminal prosecutions is bound to fail, because it requires that a fundamentally intentionalist system recognize an essentially determinist excuse. Instead, the problem of chemically-dependent offenders ought to be recharacterized as a health care matter *rather than* a criminal law matter, thus moving these cases into an alternative system which itself is governed by determinist assumptions. In the section that follows, an argument for such a recharacterization is provided.

Before doing so, one final word is required. Michael Moore's theory of responsibility helps to explain why some actors whose conduct appears to be compelled manage to avoid criminal punishment by way of the excuses of insanity, duress, and the like.²³⁸ On this view, the feature that distinguishes those cases from the loss-of-control claims raised by chemically-dependent defendants is that the former involve actors who are understood to have been denied sufficient opportunity or to have lacked sufficient cognitive capacity to engage in a process of practical reasoning. As constructed within the criminal law, most addicted and alcoholic

²³⁶ See *id.* at 132.

²³⁷ See *supra* text accompanying notes 66-67.

²³⁸ See *supra* note 71.

defendants are not viewed in this way; rather, they are understood to have had the opportunity and capacity for reflection. This has been true in those cases where courts have acknowledged that the single most powerful factor in determining a defendant's choice was his or her physical or psychological need to possess or use drugs or alcohol. An alternative approach, styling the addiction/alcoholism defense as an excuse based on the actor's impaired capacity to reason, might succeed, all other things being equal. The claim would be that chemical dependency is more like insanity or infancy, a status which so impairs practical reasoning abilities that it is fair to question the very "personhood" of the actor.²³⁹ All other things are not equal, however, and a categorical expansion of this kind would tend to undermine the law's constructional function.²⁴⁰

²³⁹ See Moore, *supra* note 4, at 1149.

²⁴⁰ A better approach, at least in those cases where it is doctrinally plausible, would be to attempt to introduce evidence as to the absence of a required specific intent occasioned by the ingestion of drugs or alcohol. While a full examination of this subject is beyond the scope of this article, it is worth noting the considerable illogic and confusion that characterizes the general intent/specific intent dichotomy, especially as it applies to intoxicated defendants. See Mathew J. Boettcher, *Voluntary Intoxication: A Defense to Specific Intent Crimes*, 65 U. DET. L. REV. 33 (1987); William Roth, *General vs. Specific Intent: A Time for Terminological Understanding in California*, 7 PEPP. L. REV. 67 (1979); Alan R. Ward, *Making Some Sense of Self-Induced Intoxication*, 45 CAMBRIDGE L.J. 247 (1986). These arcane rules, which relieve the State of its obligation to prove mens rea in cases in which the charged offense is characterized as one requiring only general intent, thereby creating a form of strict liability, are illogical. They remove from the criminal proceedings precisely that inquiry which is central to the construction of individual responsibility—the question of whether the defendant was capable of engaging in a process of practical reasoning. See Nemerson, *supra* note 6, at 423. Moreover, the doctrine in this area is remarkably incoherent. In some jurisdictions, courts have gone out of their way to interpret the mens rea element of an offense as not requiring a specific intent in order to deny to the chemically-dependent defendant the opportunity to present evidence that his or her intoxication prevented the formation of a required mental state. See, e.g., *Linehan v. State*, 442 So.2d 244 (Fla. Dist. Ct. App. 1983) (holding that the crime of arson, which requires that the defendant act "willfully," is not a specific intent crime). In jurisdictions whose criminal statutes are based on the Model Penal Code, the specific intent/general intent distinction is wholly inapplicable, having been rejected as an organizational principle by the drafters of the Code. See MODEL PENAL CODE § 2.02 comment (Official Draft 1962) (noting that by defining the general requirements of culpability by reference to "purpose," "knowledge," "recklessness," or "negligence," the Code avoids the confusion inherent in the common law categories). For a good example of the poor fit between a Model Penal Code-derived offense and the specific intent-general intent test, see *People v. Register*, 456 N.Y.S.2d 562 (N.Y. App. Div. 1982), *aff'd*, 469 N.Y.S.2d 599 (N.Y. 1983).

III. CRIMINALIZATION VERSUS MEDICALIZATION

In the *Moore* case, Judge Wright makes two critical missteps in the course of setting out his approach to the problem of addiction and criminal responsibility. The first, which has been considered above, is that he fails to allow for the possibility that an individual can simultaneously suffer from a drug- or alcohol-induced compulsion and still exercise meaningful choice.²⁴¹ The second, related problem involves Wright's effort to limit the proposed loss-of-control defense to offenses like possession, which are based upon conduct that he understands to be "inseparable from the disease itself."²⁴²

As Judge Wilkey correctly notes, the logic that undergirds Wright's acceptance of the addiction defense for possession—that compelled conduct is not blameworthy because it is not attributable to the free will of the actor—applies with equal if not greater force to other offenses for which the addiction defense would be unavailable.²⁴³ If an addict is to be exculpated for possessing narcotics because his or her disease is understood as having compelled the proscribed conduct, it is difficult to discern any logical reason for not exculpating the same addict in a prosecution for theft or robbery, when that behavior is equally attributable to the addict's compulsive need to obtain and use drugs. In fact, if we accept the premise that conduct related to an addict's dependence upon drugs or alcohol is evidence of his or her loss of control, the individual who commits a robbery to obtain the money necessary to

²⁴¹ See *supra* text accompanying notes 154-162.

²⁴² *United States v. Moore*, 486 F.2d 1139, 1257 (D.C. Cir.) (en banc) (Wright, J., dissenting), *cert. denied*, 414 U.S. 980 (1973).

²⁴³ See *id.* at 1146-47 (Wilkey, J., plurality opinion).

buy narcotics or alcohol may be deemed to be suffering from an even greater compulsion than another who resists the same temptation.²⁴⁴

These two fissures in the logical structure of Judge Wright's approach are related, because each proceeds from his attempt to employ a causal analysis within a larger context that ordinarily assumes choice and free will. Essentially Wright's position is that some conduct, for example, possession of narcotics, is so fully determined by factors beyond an actor's capacity to exercise conscious choice that it no longer makes sense to speak of that behavior as the individual's own.²⁴⁵ Although this sort of a causal account seems particularly plausible in relationship to chemical dependency, inasmuch as the use of narcotics or alcohol by a dependent individual is so often contrary to his or her self interest, it is, in theory, available for every instance of human behavior.²⁴⁶ Perhaps in recognition of this essential incompatibility between traditional notions of criminal responsibility and determinist theories of behavior, Judge Wilkey ultimately arrives at the conclusion reached some time before by Justice Black in *Powell v. Texas*, that "questions of 'voluntariness' or 'compulsion' should not be 'controlling on the question [of] whether a specific instance of human behavior should be immune from punishment.'"²⁴⁷

In the nearly two decades since *Moore*, other state courts have considered the question referred to them in general terms by Justice Marshall in the *Powell* case. With few significant exceptions, they have declined to recognize any version of the involuntariness or lack-of-choice defense pressed by alcoholic or drug-addicted defendants.²⁴⁸ The relative paucity of cases in which defendants

²⁴⁴ As Wilkey puts it, "if it is absence of free will which excuses the mere possessor-acquirer, the more desperate bank robber for drug money has an even more demonstrable lack of free will . . . [which] derive[s] from precisely the same factors as appellant argues should excuse the mere possessor." *Id.* at 1146 (emphasis omitted). Chief Judge Bazelon agreed with this criticism, yet he nonetheless joined Judge Wright's opinion. Whereas the absence of non-arbitrary limits on the new defense helped to persuade Judge Wilkey that no such defense should be recognized, the same fact led Bazelon to argue that no limits of any sort should be imposed, and that a loss-of-control defense ought to operate in all cases where a defendant is able to show a drug- or alcohol-induced compulsion. *Id.* at 1260 (Bazelon, C.J., dissenting in part). For another indication of Chief Judge Bazelon's reasoning concerning behavior produced by mental defect, see *United States v. Brawner*, 471 F.2d 969, 1022-34 (D.C. Cir. 1972) (en banc) (Bazelon, C.J., concurring).

²⁴⁵ See *supra* text accompanying note 161.

²⁴⁶ See *supra* text accompanying notes 69-73.

²⁴⁷ *Moore*, 486 F.2d at 1147 (Wilkey, J., plurality opinion) (alteration in original) (quoting *Powell v. Texas*, 392 U.S. 514, 540 (1968) (Black, J., concurring)).

²⁴⁸ See, e.g., *State v. Herro*, 587 P.2d 1181 (Ariz. 1978); *State v. Smith*, 219

have pressed a loss-of-control defense,²⁴⁹ together with the near universal hostility accorded such arguments by the few courts to reach the issue,²⁵⁰ is significant evidence that a judicially created involition doctrine is unlikely to emerge in the foreseeable future.²⁵¹

A. *The Link Between Substance Abuse and Crime*

The foregoing conclusion is particularly striking in light of the prevalence of drug and alcohol abuse within the population generally and among those enmeshed in the criminal justice system in particular. Indeed, given the sheer number of criminal defendants whose unlawful conduct is directly linked to their abuse of addictive substances, it is remarkable that so few loss-of-control claims have been raised, and so few accepted.

In 1987, out of a total of 12,711,600 criminal offenses charged in the United States, fully 937,400 were for drug offenses, 616,700 for violation of state and local liquor laws, 828,300 for drunkenness, and 1,727,200 for driving under the influence.²⁵² In addition, the great majority of the 698,700 arrests for disorderly conduct and the 36,100 arrests for vagrancy also involved the abuse of drugs or alcohol.²⁵³ Among those arrested for drug offenses, almost 75% were for possession of controlled substances, rather than for their sale or manufacture.²⁵⁴

Nationwide, drug possession and trafficking offenses accounted for nearly a quarter of all felony convictions in state courts in 1986.²⁵⁵ Within many localities the numbers are even more overwhelming. In New York City, for example, drug offenses accounted for 40% of all felony indictments in 1987,²⁵⁶ and in

N.W.2d 655 (Iowa 1974); *People v. Davis*, 306 N.E.2d 787 (N.Y. 1973), *cert. denied*, 416 U.S. 973 (1974).

²⁴⁹ See generally Phillip E. Hassman, Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 A.L.R. 3d 16 (1991) (collecting cases that have ruled on the validity of the addiction defense).

²⁵⁰ See *id.*

²⁵¹ On volition and criminal responsibility in general, see Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 ETHICS 332 (1971); Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443 (1988).

²⁵² See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988, at 481 (1989) [hereinafter SOURCEBOOK].

²⁵³ See *id.* at 481, 515.

²⁵⁴ See *id.* at 518-19.

²⁵⁵ See Nadelmann, *supra* note 17, at 941.

²⁵⁶ See Ethan A. Nadelmann, *The Case for Legalization*, THE PUB. INTEREST, Summer

Washington, D.C. in 1986, the figure stood at 52%.²⁵⁷ Estimates are that 80% of the City Jail population in Baltimore is incarcerated for drug-related crime.²⁵⁸

Despite the enormous volume of drug prosecutions, those arrested represent less than 3% of the nearly 40 million estimated users of illegal substances in the United States in a given year.²⁵⁹ Similarly, arrests for public drunkenness, vagrancy, disorderly conduct, and driving under the influence reach only a small fraction of those who regularly drink to intoxication.²⁶⁰ Thus, while states, localities, and the federal government are spending a considerable portion of their available resources to arrest, prosecute, and incarcerate substance-abusing offenders,²⁶¹ these expenditures are in all likelihood buying little in the way of deterrence or incapacitation.²⁶²

The link between substance abuse and crime goes far deeper than that suggested by the arrest, conviction, and incarceration rates for offenses such as narcotics possession and public drunkenness. First, many users commit criminal offenses such as robbery and burglary in order to obtain money for the purchase of drugs or alcohol. In one recent study conducted in Miami, 573 narcotics users were shown to have committed 6,000 robberies and assaults, nearly 6,700 burglaries, and more than 46,000 other larceny and fraud offenses in a single year.²⁶³ In addition, although most

1988, at 3, 16.

²⁵⁷ See PETER REUTER ET AL., GREATER WASH. RESEARCH CTR., DRUG USE AND DRUG PROGRAMS IN THE WASHINGTON METROPOLITAN AREA 38 (1988).

²⁵⁸ See *Legalization of Illicit Drugs—Impact and Feasibility, Part I: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess. 190 (1988) (testimony of the Honorable Kurt L. Schmoke, Mayor of Baltimore) [hereinafter *Legalization Hearings*].

²⁵⁹ The percentage stated was derived from the number of drug offenses in 1987, see *supra* note 252 and accompanying text, with the total number of users in 1985. See NATIONAL INST. ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1985, at 54 (1987).

²⁶⁰ See SOURCEBOOK, *supra* note 252, at 374 (reporting the results of an October 1987 Gallup Poll on the percentage of Americans who abuse alcohol).

²⁶¹ In 1986, for example, state and local law enforcement agencies spent an estimated \$5 billion on drug enforcement. This constituted about one-fifth of their total investigative resources. See Nadelmann, *supra* note 17, at 940. Similarly, in 1987, state and local governments spent \$2 billion to confine convicted drug offenders. See *id.* at 941.

²⁶² See *Oversight of Federal Drug Policy Programs Affecting State and Local Governments: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. 85-87 (1989) (testimony of the Honorable Kurt L. Schmoke, Mayor of Baltimore) [hereinafter *Federal Drug Policy Hearings*].

²⁶³ See JAMES A. INCIARDI, THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND

chemically-dependent persons do not commit crimes other than possession or use of illegal substances,²⁶⁴ the abuse of drugs and alcohol is significantly higher among criminal offenders than within the general population. A 1986 study found that 43% of state prisoners had used illegal drugs on a regular basis in the month prior to their commission of the crime for which they were incarcerated,²⁶⁵ and 35% were under the influence of drugs at the time of their commission of that offense.²⁶⁶ Similarly, a 1983 survey found that 54% of inmates nationwide who had been convicted of violent criminal offenses had ingested alcohol just before committing their offense.²⁶⁷

On the other hand, reliable data suggest that crime rates among substance abusers decline dramatically when they enter treatment. In Baltimore, for example, recent figures show that 63% of those admitted to treatment had been arrested one or more times in the twenty-four months preceding their admission; by comparison, the arrest rate for those in treatment was only a little over 8%.²⁶⁸ Despite the encouraging prospects for a reduced incidence of criminal activity inherent in this connection between treatment and crime rates,²⁶⁹ the clear focus of public policy at the federal, state, and local levels has continued to be on law enforcement.

Representative of this approach is the National Drug Control Strategy announced by President Bush in September of 1989.²⁷⁰ Under that plan, 70% of the federal antidrug abuse budget was earmarked for law enforcement, while only 30% was allocated for treatment.²⁷¹ From a cost-benefit point of view, such an alloca-

PUBLIC POLICY 126 (1986).

²⁶⁴ See Nadelmann, *supra* note 17, at 941.

²⁶⁵ See BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, DRUG USE AND CRIME 6 (1988).

²⁶⁶ See SOURCEBOOK, *supra* note 252, at 623.

²⁶⁷ See Nadelmann, *supra* note 17, at 941; SOURCEBOOK, *supra* note 252, at 624. It should be noted that more offenders use alcohol than illegal drugs. See BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE 39 (1983).

²⁶⁸ See *Legalization Hearings*, *supra* note 258, at 189; see also INCIARDI, *supra* note 263, at 119.

²⁶⁹ For additional discussion of the capacity of substance abuse treatment to reduce the incidence of crime, see Henrick J. Harwood et al., *The Costs of Crime and the Benefits of Drug Abuse Treatment*, in COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 209, 232 (NIDA Research Monograph 86, 1988); George Speckart & M. Douglas Anglin, *Narcotics and Crime*, 3 BEHAV. SCI. L. 259, 266 (1985).

²⁷⁰ See NATIONAL DRUG CONTROL STRATEGY, *supra* note 16.

²⁷¹ See *id.* at 100.

tion of resources is curious. As Kurt Schmoke, the mayor of Baltimore, pointed out in recent testimony before a Senate committee studying federal drug policy: "It costs Baltimore City \$20,000 to \$30,000 dollars per inmate per year. We provide effective drug treatment for \$1,500 per person per year. I was recently told that it costs less money (a lot less) to send someone to Penn State than to the State Pen."²⁷²

B. *The Case For Partial Decriminalization*

The many problems associated with widespread substance abuse and chemical dependency have been framed primarily as concerns of the law enforcement system.²⁷³ This public policy decision has applied not only to chemically-dependent actors whose conduct has resulted in the victimization of others (in the form of theft offenses, assaults, homicides, automobile accidents, and the like), but also to crimes such as drug possession, vagrancy, and drunkenness, which do not directly threaten the property or well-being of others.²⁷⁴

An alternative policy is available, however, that would recharacterize the vast majority of addicts and alcoholics as patients to be treated rather than as criminal offenders to be punished.²⁷⁵ Such an alternative, which would take as its primary goal the reduction of a wide range of harms associated with drug and alcohol abuse, might be structured in a variety of ways. One possibility would be to decriminalize possessory and public intoxication offenses²⁷⁶ in

²⁷² *Federal Drug Policy Hearings*, *supra* note 262, at 95 (testimony of Honorable Kurt L. Schmoke, Mayor of Baltimore).

²⁷³ These problems include increased incidence of motor vehicle accidents; increased health costs and lost productivity on the part of workers; control of the manufacturing and distribution of drugs by a criminal underworld; widespread mislabeling and adulteration of illegal substances; the spread of AIDS; the use of children as drug runners and drug dealers; and crimes of violence committed by those engaged in drug distribution. In addition, the disintegration of whole communities has been linked to the spread of drug and alcohol abuse. See *Legalization Hearings*, *supra* note 258, at 188-98.

²⁷⁴ For a good overview of the contributions of various governmental actors to this policy of enforcement, see Powell & Hershenov, *supra* note 16, at 565-80.

²⁷⁵ Of course, this need not be an either/or decision. There is no necessary contradiction between holding addicted or alcoholic offenders criminally responsible for their actions and offering them treatment in an effort to help them avoid such actions in the future. As will be explained below, however, the combination of system overload and targeted law enforcement associated with the "war on drugs" does push in the direction of decriminalization. See *infra*, text accompanying notes 284-305.

²⁷⁶ See *Legalization Hearings*, *supra* note 258.

order to direct more users into an expanded public health system.²⁷⁷

1. Decriminalization

The distinction between "decriminalization" and "legalization" is important. A strategy of decriminalization relies upon a recharacterization of chemical dependency as a concern of the public health system, and stresses the continuation and strengthening of regulatory controls governing the manufacture and distribution of addictive substances. Legalization, on the other hand, grows out of libertarian concepts that press toward a more generalized deregulation of the area.²⁷⁸

²⁷⁷ Among the recommendations urged by Mayor Schmoke in his testimony to a House committee studying the matter were the following:

1. United States drug policies and practices should be revised to ensure that no narcotics addict need get his or her drug from the "black market".

a. Methadone maintenance should be expanded so that, under medical auspices, every narcotics addict who applies for treatment can receive it.

b. Other forms of narcotics maintenance, including cocaine and heroin maintenance, should be made available, along with methadone maintenance, under medical auspices. It will be up to the physician to determine whether the person requesting maintenance is an addict. Drugs will not be dispensed to non-users.

c. End the requirement that persons be addicted for at least one year before being eligible to enter a methadone treatment program.

2. Ban all advertising of drugs including alcohol and tobacco.

....

5. Institute a clean needle exchange program as a way to reduce the spread of AIDS.

6. The federal government should lead a coordinated approach to adolescent drug education.

7. Develop community based programs designed to reach at-risk youths.

These would include education, employment and mentor programs.

Legalization Hearings, *supra* note 258, at 204-05. Other recommendations urged by Schmoke included increased penalties for driving under the influence, and mandatory jail terms for those who finance the importation and/or distribution of illicit drugs. *See id.* at 206.

²⁷⁸ *See* Nadelmann, *supra* note 17, at 939; James Ostrowski, *Thinking About Drug Legalization*, 121 POL'Y ANALYSIS 1 (1989). Within a strategy of decriminalization, the medical profession would be called upon to take over for the underground markets that now provide manufacturing and distributing functions. Not only can this approach be expected to minimize the risk of increased use, it would also address the very real problems of adulteration, poor quality control, and mislabeling that currently pose severe health threats to the thousands of illegal drug users in the United States. *See* Ostrowski, *supra*, at 14.

Because proposals to decriminalize possessory offenses draw the same line as that proposed by Judge Wright in his *Moore* opinion, they would appear to be subject to the sort of criticisms levelled by Judge Wilkey against the proposed loss-of-control defense. If addicts are to be exempted from criminal liability for possession, it is difficult to understand why other chemically-dependent offenders who commit offenses against persons or property in order to obtain money to satisfy a compulsion to ingest drugs are not equally blameless.²⁷⁹

A satisfactory response, unworkable when applied to the line-drawing suggested by Judge Wright, is available in the present context. The distinction adopted in Wright's *Moore* dissent between possession and other offenses was meant to describe the boundaries of criminal responsibility and excuse. In that context the limitation was incoherent because the same loss-of-control logic urged as the basis for granting an excuse for possessory crimes would apply equally to offenses for which the new defense would be unavailable. On the other hand, when framed as a question of criminalization, the same distinction between possessory offenses and other crimes can withstand Wilkey's criticism. In this context, the presence or absence of liability does not rely on the actor's perceived ability to exercise free choice, but on the whole range of societal considerations that inform legislative decisions about where to employ the criminal law as an institution of social control.²⁸⁰

There are, of course, risks associated with an approach that would remove criminal law prohibitions against the possession and use of addictive substances.²⁸¹ The attendant potential benefits,

The situation with respect to alcohol abuse is somewhat different, since liquor is now not an illegal substance. However, proposals like those offered by Mayor Schموke of Baltimore have two potential benefits. First, by stressing the health risks associated with the abuse of addictive substances generally, the unfounded distinctions now drawn with respect to the relative dangerousness of alcohol as opposed to other substances would be undermined, and prevention efforts directed to reducing alcoholism strengthened. Additionally, noncriminal regulations governing the sale and distribution of alcohol, especially to minors, might be more strictly enforced. See *Legalization Hearings*, *supra* note 258, at 201-02.

²⁷⁹ See *supra* text accompanying notes 242-244.

²⁸⁰ For a discussion of criminalization, see *supra* notes 20-21 and accompanying text.

²⁸¹ Ethan Nadelmann has summarized the potential downside of decriminalization in the following terms:

The impact of legalization on the nature and level of consumption of those drugs that are currently illegal is impossible to predict with any accuracy. On the one hand, legalization implies greater availability, lower prices, and

however, are considerable.²⁸² For purposes of this article, the likely consequences of greatest interest involve the operation of the criminal justice system itself. A decision to redirect investigative, prosecutorial, adjudicative, and correctional efforts away from mere possession and intoxication would, in the first instance, go a long way toward unburdening a dangerously overtaxed system.²⁸³ Moreover, to the extent that a truly active public health system would provide increased prevention, education, and treatment resources, and might thereby reduce the abuse of drugs and alcohol in the population generally, the number of offenses against persons and property could be expected to diminish as well.²⁸⁴

2. System Overload and Racial Disparity

Of even greater importance are the potential benefits of decriminalization associated with the expressive and ideological functions of the criminal law. At present there is widespread noncompliance with the legal prohibitions against possession and use of drugs. This sort of defiance has the potential to create a corrosive cynicism, and to undermine the capacity of the legal system to articulate and reinforce other important societal norms.²⁸⁵ The removal of these regularly disregarded prohibitions, and the attendant recharacterization of drug and alcohol

the elimination (particularly for adults) of the deterrent power of the criminal sanction—all of which would suggest higher levels of use. Indeed, some fear that the extent of drug abuse and its attendant costs would rise to those currently associated with alcohol and tobacco. On the other hand, there are many reasons to doubt that a well-designed and implemented policy of controlled drug legalization would yield such costly consequences.

Nadelmann, *supra* note 17, at 943 (footnote omitted); see also Mitchell Rosenthal, *In Opposition to Drug Legalization*, 24 U.C. DAVIS L. REV. 637, 648-53 (1991) (discussing the potentially detrimental effects of decriminalization).

²⁸² Advocates of decriminalization have identified a long list of benefits likely to flow from their proposals. They have included: taking the production and distribution of drugs out of the hands of criminals; reducing the instances of addicts using impure and mislabeled drugs; increasing tax revenues associated with the sale of drugs; creating the opportunity to shape consumption patterns; reducing the spread of AIDS; minimizing the victimization of children currently employed in illegal drug dealing; and correcting the inconsistent messages now in place regarding the relative dangerousness of alcohol and tobacco. See *Legalization Hearings*, *supra* note 258, at 30-41; David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24 U.C. DAVIS L. REV. 655 (1991); Nadelmann, *supra* note 17, at 945; Powell & Hershenov, *supra* note 16, at 600-09.

²⁸³ See Nadelmann, *supra* note 17, at 941.

²⁸⁴ See Henderson, *supra* note 282, at 657-60.

²⁸⁵ See Nadelmann, *supra* note 17, at 942.

abuse as medical problems, might well ameliorate one significant source of the criminal justice system's current crisis of legitimacy.²⁸⁶

In addition, the legal system's ability to provide individualized consideration for defendants, which in turn is central to the system's ability to construct an ideology of individual responsibility, has been adversely affected by the crush of cases generated by the prevailing policy of criminalization.²⁸⁷ For years, commentators have expressed concern that the high volume of cases in the criminal courts has created a harmful preoccupation with moving cases and clearing dockets.²⁸⁸ The resulting tendency toward "mass production" and away from individualized responses²⁸⁹ is fundamentally inconsistent with an institutional agenda that calls upon the criminal law to construct compelling accounts of autonomous human behavior.²⁹⁰

Here again, a preexisting weakness within the system has been exacerbated by the decision to treat the problem of widespread substance abuse primarily as a matter for the criminal law. The system's capacity to generate intentionalist narratives has long been in tension with its need to process cases efficiently.²⁹¹ As more and more cases involving possession, public drunkenness, and the like have come into the system, the balance has swung increasingly toward a routinized process of adjudication and sentencing, in

²⁸⁶ On the crisis of legitimacy generally, see Mary S. Knudten et al., *Will Anyone Be Left To Testify? Disenchantment With The Criminal Justice System*, in *THE NEW AND THE OLD CRIMINOLOGY* 207 (Edith E. Flynn and John P. Conrad eds., 1978). On the special problems that exist with respect to the legitimacy of the system among people of color, see 1 *REPORT OF THE N.Y. STATE JUDICIAL COMMISSION ON MINORITIES, EXECUTIVE SUMMARY* 37 (April 1991) [hereinafter *N.Y. COMM'N ON MINORITIES REPORT*].

²⁸⁷ On criminal court congestion, see NATIONAL CTR. FOR STATE COURTS, *ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS* (1988); BARRY MAHONEY, NATIONAL CTR. FOR STATE COURTS, *CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS* (1988).

²⁸⁸ See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 10-11 (1967) ("An inevitable consequence of [high] volume [in the lower criminal courts] is the almost total preoccupation in such . . . court[s] with the movement of cases.").

²⁸⁹ See Geoffrey C. Hazard, Jr., *Criminal Justice System: Overview*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 450, 454 (Sanford H. Kadish ed., 1983).

²⁹⁰ See *supra* text accompanying notes 124-144 and accompanying text.

²⁹¹ A particularly useful discussion of the tension between adversarial process and system efficiency is presented in DAVID L. BAZELON, *Counsel and Conscience*, in *QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW* 170 (1987).

which offenders are classified by type and evaluated according to commonly-shared group characteristics.

This routinization has occurred throughout the system. At the pretrial stage, for example, decisions with respect to bail frequently are made on the basis of criteria such as "family stability" and educational background, which result in a disproportionate percentage of African American and Hispanic defendants being denied pretrial release.²⁹² Similarly, as the pressures induced by case overload increase, so does the system's reliance on negotiated guilty pleas as a means by which charges are resolved. Here again, a review of the plea negotiation process typical in many criminal courts reveals that race-based factors play a meaningful role in determining outcomes.²⁹³

As David Bazelon has pointed out, the results of plea negotiations depend in large part on the efforts of competent counsel. As more cases find their way into the criminal justice system, the differential impact of inadequate assistance of counsel becomes greater and "the burden of less effective advocacy falls almost exclusively on a single subclass of society—the poor."²⁹⁴

Finally, at the sentencing phase of the process, group characteristics have been found to affect significantly the punishment received by defendants. A recent study by the New York State Division of Criminal Justice Services found that African-Americans

²⁹² See N.Y. COMM'N ON MINORITIES REPORT, *supra* note 286, at 38-39. In addition, given the strong correlation between pretrial release and final disposition of charges, this increased pretrial incarceration of defendants of color tends to result in more convictions and longer sentences. *See id.*

²⁹³ See generally COMM'N ON MINORITIES REPORT, *supra* note 286, at 40 (describing "invidious distinctions" in the plea offers made to white and African-American defendants); RAYMOND J. MICHALOWSKI, ORDER, LAW, AND CRIME 210-15 (1985) (examining the plea bargaining process in American courts).

²⁹⁴ BAZELON, *supra* note 291, at 172; *see also* MICHALOWSKI, *supra* note 293, at 212-13 (arguing that poor defendants are more likely to be convicted than those who can afford private attorneys because of the pressures on public defenders). Indeed, there is good reason to believe that the incentive to plead guilty increases with the strength of the defendant's case. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-61 (discussing the prosecutorial practice "of bargaining hardest when the case is weakest"). In the absence of committed counsel with adequate resources—a condition increasingly unavailable to poor Black and Hispanic defendants—the likely consequence is that outcomes will depend more and more on who the defendant is rather than what he or she has done. *See* Abraham S. Blumberg, *Lawyers with Convictions*, in LAW AND ORDER: THE SCALES OF AMERICAN JUSTICE 67-68 (Abraham S. Blumberg ed., 1973); *cf.* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. (forthcoming 1992).

are much more likely to receive jail sentences than are white defendants with similar backgrounds who have been convicted of the same offenses. In one New York county, this study found that white felony defendants with prior criminal records had a 39% chance of being incarcerated, while essentially similar minority defendants faced a 52% risk of incarceration.²⁹⁵

The current criminal enforcement approach to drug and alcohol abuse has fueled a related trend that has converged with case overload to undermine the ideological functioning of the system. Not only has the "war on drugs" greatly increased the volume of cases in the system, thereby elevating an already-existing pressure toward mass production, equally destructive of the system's ideological functioning has been the targeting of people of color living in inner cities as objects of that war.²⁹⁶

²⁹⁵ See N.Y. COMM'N ON MINORITIES REPORT, *supra* note 286, at 41. The data also suggest that white defendants who are incarcerated receive shorter sentences than similarly situated African-American and Hispanic defendants. *See id.*

The relationship between race and sentencing has been the focus of much recent scholarship. In one study, an author conducted a comprehensive examination of racial discrimination in the criminal justice systems of California, Michigan and Texas. In each of those states, she found that "judges typically imposed heavier sentences on Hispanics and blacks than on whites convicted of comparable felonies and who had similar criminal records. Not only did these minorities receive harsher minimum sentences but they also served more time." Joan Petersilia, *Racial Disparities in the Criminal Justice System: A Summary*, 31 CRIME AND DELINQ. 15, 15 (1985); *see also* Norval Morris, *Race and Crime: What Evidence is there that Race Influences Results in the Criminal Justice System?*, 72 JUDICARE 111, 113 (1988) (concluding that there is measurable discrimination against African-Americans in police practices, prosecutorial practices, plea bargaining, and sentencing); Jim Sidanius, *Race and Sentence Severity: The Case of American Justice*, 18 J. OF BLACK STUD. 273, 278 (1988) (concluding that racism accounts for disproportionate sentencing).

Other researchers have argued that the weight of available evidence contradicts the conventional wisdom that widespread race discrimination exists in sentencing in the United States. *See, e.g.,* Gary Kleck, *Life Support for Ailing Hypotheses: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing*, 9 LAW & HUM. BEHAV. 271 (1985). Still other writers have suggested that the influence of race on sentencing is conditional upon other case-related attributes. *See* James D. Unnever & Larry A. Hembroff, *The Prediction of Racial/Ethnic Sentencing Disparities: An Expectation States Approach*, 25 J. OF RES. CRIME & DELINQ. 53 (1988). Finally, some authors have concluded that disparities in sentencing on the basis of race are reduced or eliminated in jurisdictions that have adopted determinate sentencing schemes. *See, e.g.,* Marjorie S. Zatz, *Race, Ethnicity, and Determinate Sentencing*, 22 CRIMINOLOGY 147 (1984).

²⁹⁶ A number of law enforcement techniques that rely upon the group characteristics of suspects rather than upon individualized data as to particular conduct have been adopted or used with increasing frequency as the drug war has heated up. All of these techniques have targeted people of color. Powell and Hershenov, for example, note that the use of drug courier profiles as a substitute for individualized

The data on this point are simply overwhelming. Recent studies have shown that as many as 90% of all those arrested for drug-related offenses are African-American, despite the fact that the National Institute on Drug Abuse places the percentage of African-Americans within the general population of drug users at a relatively low 12%.²⁹⁷ Moreover, given the characteristics of those arrested and the growing percentage of drug offenders in prison, it should come as no surprise that over 50% of all inmates in the United States are African-American.²⁹⁸ As reported by the Federal Sentencing Project, nearly one-quarter of all African-American men are under the supervision of the criminal justice system.²⁹⁹ As long ago as 1977, two respected anthropologists who conducted a cross-cultural study of criminal law described the prison system in the United States as a "model . . . of internal colonialism."³⁰⁰ The realities of our current drug war have made their observation even truer today.³⁰¹

decision making on the part of the police has made African-Americans particularly subject to unjustified police harassment. See Powell & Hershenov, *supra* note 16, at 582-85. See also Joseph F. Sullivan, *New Jersey Police Are Accused of Minority Arrest Campaigns*, N.Y. TIMES, Feb. 19, 1990, at B3 (citing statistics showing that 80% of highway arrests involved African-American males driving late model automobiles or automobiles with out-of-state plates, while less than 5% of all traffic met that profile). The use of such profiles has been upheld by the U.S. Supreme Court, see *United States v. Sokolow*, 490 U.S. 1 (1989), despite Justice Marshall's observation in dissent that such profiles result in subjecting innocent individuals to unwarranted police harassment and detention. See *id.* at 12 (Marshall, J., dissenting). Similarly, the increasingly popular practice of neighborhood sweeps, which involve the rounding up of large numbers of African-American males without individualized determinations of reasonable suspicion, has moved the system away from considerations of conduct and toward labelling people on the basis of their characteristics and circumstances. See Powell & Hershenov, *supra* note 16, at 584, 613-14; see also Randolph N. Stone, "War on Drugs," *Crime Fought on Wrong Battlefields*, CHI. DEFENDER, Oct. 31, 1989, at 42 (arguing that the ongoing "war on drugs" presents a serious threat to the African-American community).

²⁹⁷ See *id.* at 610.

²⁹⁸ Indeed, in the state of New York over 80% of state prison inmates are people of color; in New York City the figure is 95%. See Powell & Hershenov, *supra* note 16, at 610-11.

²⁹⁹ See *id.* at 611.

³⁰⁰ Laura Nader & Elaine Combs-Schilling, *Restitution in Cross-Cultural Perspective*, in *RESTITUTION IN CRIMINAL JUSTICE* 13, 28 (Joe Hudson ed., 1975). Indeed, a new study conducted by the National Center on Institutions and Alternatives found that, on any given day in 1991 in Washington, D.C., 42% of all African-American men between the ages of 18 and 35 were enmeshed in the criminal justice system. See Jason DeParle, *42% of Young Black Men are in Capital's Court System*, N.Y. TIMES, Apr. 18, 1992, at A1. The study also found that as many as 70% of African-American men in Washington are arrested by the time they turn 35, and that up to 85% are likely to be arrested at some point in their lives. *Id.*

³⁰¹ For a good discussion of institutional racism within the criminal law prior to

3. The "War on Drugs" and Distorted Discourse

These figures raise serious questions regarding the evenhandedness of the "war on drugs."³⁰² Also troubling are the effects that

the current war on drugs, see Gwynne Peirson, *Institutional Racism and Crime Clearance*, in BLACK PERSPECTIVES ON CRIME AND THE CRIMINAL JUSTICE SYSTEM 107 (Robert L. Woodson ed., 1977).

³⁰² Of particular note in this regard is a recent decision of the Minnesota Supreme Court, in which a Minnesota sentencing statute was found to be violative of the state's constitution because it punished the possession of cocaine base more severely than possession of cocaine powder. The court noted the findings of the trial judge that crack cocaine is used predominantly by African-American defendants, while cocaine powder is used more often by whites, and on those grounds held that the statute discriminated unfairly on the basis of race. *See State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991). Significantly, the Minnesota legislation was preceded by a federal statute which equates 100 grams of cocaine powder and one gram of cocaine base for the purpose of determining punishment. *See Anti-Drug Abuse Act of 1986*, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 (Oct. 27, 1986) (amending 21 U.S.C. § 841(b)-(1)(B)). The federal provision has withstood a number of federal constitutional attacks. *See, e.g., United States v. Levy*, 904 F.2d 1026, 1034-35 (6th Cir. 1990) (holding that the Sentencing Guidelines of the Anti-Drug Abuse Act did not violate due process and the Eighth Amendment prohibition against cruel and unusual punishment), *cert. denied*, 111 S. Ct. 974 (1991); *United States v. Buckner*, 894 F.2d 975 (8th Cir. 1990) (holding that the section of drug quantity and drug equivalent tables for determining sentencing levels did not violate substantive due process and the Eighth Amendment); *United States v. Cyrus*, 890 F.2d 1245, 1248-49 (D.C. Cir. 1989) (holding that Federal Sentencing Guidelines for possession of "cocaine base" (crack) did not violate the Eighth Amendment, due process, and equal protection).

A review of the history of criminalization, of which the "war on drugs" is but the latest chapter, reveals that the United States has repeatedly employed criminal prohibitions against addictive substances in order to aid in the subordination of targeted groups within our society. The temperance movement of the late 19th and early 20th centuries, for example, served the interests of a xenophobic movement that equated the dangers of alcohol with the unsettling activity of leftist union organizers and others associated with a growing class of immigrant laborers. *See* JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE* (1963); JOHN J. RUMBARGER, *PROFITS, POWER, AND PROHIBITION* (1989); Harry G. Levine, *The Alcohol Problem in America: From Temperance to Alcoholism*, 79 *BRIT. J. ADDICTION* 109 (1984).

Similarly, the first criminal provisions against the use of opium in California in the 1870s were the result of a virulent anti-Chinese sentiment fueled by job competition between white workers and Chinese immigrants, following completion of the railroads. The initial opium-smoking prohibitions were part of a larger constellation of racist legislative activity designed to suppress the Chinese minority, and were accompanied by sensationalist accounts of Chinese men taking advantage of white women in opium dens. *See* DAVID E. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (1973); ELMER C. SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1939); Patricia A. Morgan, *The Legislation of Drug Law: Economic Crisis and Social Control*, 8 *J. DRUG ISSUES* 53, 54 (1978).

Even the Harrison Act of 1914, which was the first federal prohibition relating to cocaine and the opiates, was passed on the heels of overblown media accounts that depicted cocaine-crazed Blacks in the South and heroin-addicted Black prostitutes and

such a targeted policy of law enforcement has upon the normative foundation of our formal blaming practices. The popular images that emerge from the daily operations of our criminal courts are populated by stereotyped defendants regarded as "bad people" because of who they are rather than what they may have done.³⁰³ This trend is fundamentally at odds with the normative premise upon which our blaming practices rests.

Longstanding notions of blameworthiness rely on the characterization of individual defendants as moral actors. This, in turn, requires that we conceive of one another as free to make individual decisions at odds with our circumstances.³⁰⁴ A system that resolves cases according to the appearance of defendants, according to their race and social class as much as their behavior, ultimately is ill-equipped to construct and reinforce a common morality in which people are thought of as deserving praise or blame on the

criminals in the cities. See MUSTO, *supra*, at 7, 65. Here again, artificially created fears about the supposed links between narcotics and a "black rebellion" in the South, and images of Black addicts raping white women were central to the hysteria that found its way into legislative enactments. See *id.* Significantly, the class and racial fears that ignited this earlier drug war developed at a point when the use of opiates was spreading from white, middle-class women to younger African-American men. See TROY DUSTER, *THE LEGISLATION OF MORALITY* (1970). This forms an important historical parallel to the current round of drug hysteria, centered around the use of crack cocaine by young African-American men. The social history of the last fifteen years makes clear that a concerted law enforcement policy against the use of cocaine was largely absent in the late 1970s and early 1980s, when cocaine powder was a popular amusement of those within the young, white, professional class. It was not until the development of crack (a cheaper form of cocaine) made it possible for residents of the Black inner city to become users that the dangers of this drug were "discovered" and a punitive enforcement policy undertaken. Indeed, the Drug Enforcement Agency has reported that the extent of crack use has been overemphasized relative to the use of other drugs. See James A. Inciardi, *Beyond Cocaine: Basuco, Crack, and Other Coca Products*, 14 CONTEMP. DRUG PROBS. 461, 482 (1987).

³⁰³ In their discussion of the "disproportionate focus of law enforcement on black (and Latino) offenders," Powell and Hershenov provide what they term a "portrait" of the "nation's predominant image of the drug problem":

gun-toting black teenage gangs, ghetto crack houses where unspeakable horrors take place, and deprived black women who prostitute themselves to raise money for their crack, and who give birth to tiny, drug addicted babies whose pictures are plastered all over our subway cars in extravagantly graphic public service messages warning of the dangers of drugs.

Powell & Hershenov, *supra* note 16, at 611 (quoting L. Siegel, *The Criminalization of Pregnancy: A Paradigm of America's "Harm Maximization" Approach to Drug Use*) (unpublished memorandum prepared for the ACLU, on file with U.C. Davis Law Review).

³⁰⁴ See Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts III & IV*, 87 COLUM. L. REV. 920, 934-36 (1987).

basis of conduct undertaken in spite of their place in society. Instead, a lurking determinist account begins to take precedence in our collective consciousness.³⁰⁵ We begin to see criminal defendants as objects rather than as persons, and the normative basis for imposing punishment is lost.³⁰⁶

Some attention to the discursive practices associated with contemporary criminal blaming is required in order to comprehend how the combination of system overload and a policy of race-specific law enforcement have functioned together to generate this new form of blaming. Socially significant discourse can occur through a wide variety of communicative acts. To the extent that these acts take place in regularly recurring patterns, powerful images may be set up that reinforce some ideas while obscuring others. Thus, meaning may be conveyed by "a discursive process through which aspects of existing practice are selected, emphasized, refined, and formally discussed, while other aspects are ignored, subordinated, dispersed, and relegated to the informal."³⁰⁷

As noted earlier in this article, the adjudication of criminal cases can be viewed as a kind of discursive process in which particular interpretive constructs are employed in order to mediate an always present intentionalist/determinist dualism. To the extent that this sort of process is in place, we have seen that its effect, in the

³⁰⁵ See David Boaz, *A Drug-Free America—Or a Free America?*, 24 U.C. DAVIS L. REV. 617, 631-35 (1991) (arguing that the drug war, like the disease model of addiction, has undermined notions of individual responsibility). Cf. Robin West, *supra* note 136, at 175 (arguing that the tension between rights assertion and narrative must be balanced in order to establish both individual responsibility for crime and societal responsibility for the conditions feeding criminality).

³⁰⁶ Generally shared notions regarding individual choice and responsibility are critical in shaping the behavior of all community members, and in encouraging voluntary compliance with societal norms. A quick look at the actual reach of the enforcement system makes this point dramatically. Of all criminal offenses committed in the United States, only a small subset are reported to law enforcement authorities, and an even smaller percentage are closed by arrest or prosecuted. See SOURCEBOOK, *supra* note 252, at 427 (offenses known to police), 481 (estimated number of arrests), 511 (offenses cleared by arrest). From the perspective of effective social control, the notion that compliance generally can be coerced simply is untenable. The more sensible view is that crime control is achieved through the "suggestive influence" of the criminal justice system. See Joseph S. Roucek, *The Concept of Social Control in American Sociology*, in SOCIAL CONTROL FOR THE 1980's, *supra* note 65, at 11, 12; see also, Nicholas N. Kittrie, *Symbolic Justice—The Trial of Criminal Cases*, reprinted in part in NICHOLAS N. KITTRIE & ELYCE ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS 182 (1981).

³⁰⁷ Dragan Milovanovic & Stuart Henry, *Toward a New Penology: Constitutive Penology*, 18 SOC. JUST. 204, 206 (1991).

ordinary case, is to reinforce notions of individual autonomy and free choice, while simultaneously obscuring the causal roots of criminal behavior.³⁰⁸

But what are the consequences for society when these interpretive constructs are no longer functional? What meanings are communicated when the system continues to assign blame and impose punishment without the benefit of individualized adjudications essential for the sorting out of intentionalist stories from causal accounts?

A way into this maze has been provided by Robin West in a recent article on the role of narrative in a different area of criminal blaming, death penalty cases.³⁰⁹ In West's account, lawyers and judges engage in two kinds of discrete activity in the course of trying and adjudicating cases. Some legal discourse takes the form of rights assertion, while other discourse involves narrative or storytelling. Essentially, West argues that storytelling can be employed either to assign or withhold responsibility for an event, while rights assertion is useful only to deny the relevance of responsibility.³¹⁰

Applying this basic distinction to a recent line of Supreme Court death penalty cases, West explains that the conservative majority on the Court has adopted the practice of relying on narratives in order to recount the story of a victim's death and to convey a defendant's individual blame for the violent horrors detailed. By contrast, the liberal justices' dissenting opinions in each case eschew any attempt at narrative, relying instead on fairly standard rights analyses. In West's terms, the failure of the liberals to construct counter-narratives is significant, because it means that they are unable to "respond to the need to assign responsibility for criminality itself, whether to the defendant, society, or history."³¹¹ The criminal process is, in important respects, about blame and desert. By refusing to engage in storytelling, the liberals are described as ceding the field to the conservatives, whose narratives are limited to highly individualistic notions of responsibility.³¹²

³⁰⁸ See *supra* text accompanying notes 120-130.

³⁰⁹ See West, *supra* note 136.

³¹⁰ See *id.* at 167.

³¹¹ *Id.* at 174.

³¹² As West explains it: "[B]y eschewing both the narrative voice and themes of responsibility, the liberals neglect an opportunity to construct an alternative understanding of societal responsibility for criminality that might challenge the unbridled individualism of the narrative account provided by the conservative

West's account is an important first step in understanding how adjudicatory narratives function. In her telling, the question is whether narratives pressing toward the attribution of individual responsibility are to be balanced with counter-narratives that make possible an alternative understanding of societal responsibility for criminal conduct.

When applied to the mass of cases brought into the system as a consequence of the war on drugs, however, the analysis must necessarily be modified, because neither the standard narrative nor the urged counter-narrative is regularly offered.³¹³ Instead, we are left with a sort of narrative vacuum that makes impossible the articulation of either individual or societal notions of responsibility. Moreover, this discursive vacuum has developed in a system that has continued to assign blame and impose punishment on an enormous number of criminal defendants drawn from distinct subordinated populations.³¹⁴

This has contributed to the development of a remarkable distortion of our traditional normative order. African-Americans and Hispanics have long been overrepresented within the criminal system.³¹⁵ The drug war has had two effects: it has increased that overrepresentation, and it has so overloaded the system that

majority." *Id.* at 175.

³¹³ Articulation of the standard narrative requires that individualized adjudications take place with sufficient regularity to create the perception that blame is being assigned on the basis of freely chosen, autonomous conduct. See *supra* text accompanying notes 304-306. An illustrative counter-narrative of the type which is also not being generated has been offered by James Doyle:

A claim that [inner city] residents bear no responsibility for the drug epidemic that plagues their communities would be ridiculous, but can it possibly be true that the larger society bears *no* responsibility? Drugs are valuable because they are scarce. They are scarce because they are illegal. . . . In many areas of the [inner city], drugs are the *only* things with value. The [inner city] has no goods or services, or at least so few that the decision to traffic in drugs is an economically rational (even if morally unattractive) decision. The economic conditions that have given rise to that situation cannot be entirely a product of the [inner city] itself. The drugs are not grown, or refined, or even, for the most part, wholesaled in the [inner city]. Nevertheless, larger society tends to assume that the [inner city] residents, so distant and different, have created the drug epidemic for themselves.

James M. Doyle, *Into the Eight Ball: The Colonialists' Landscape in American Criminal Justice*, 12 B.C. THIRD WORLD L.J. 65, 93 (1992).

³¹⁴ See *supra* text accompanying notes 289-300.

³¹⁵ See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 523-34 (1944).

individualized adjudications are not always possible. With the muting of individualized narratives, the overt characteristics of criminal offenders, the features they tend to share, take on a special salience. In the absence of any acknowledgement of a general societal responsibility for involvement in the criminal system of these discrete groups, their shared characteristics are, by necessity, assigned moral significance.³¹⁶ The end result is that African-American and Hispanic offenders are themselves thought to be responsible for the conditions that contribute to their criminality.³¹⁷

This state of affairs is distinguishable from that which led Judge David Bazelon to consider a defense for "rotten social background."³¹⁸ Central to Bazelon's analysis was the notion that a defendant's deprived background might so impair his or her ability to exercise free choice that he or she might be entitled to a defense.³¹⁹ Stephen Morse and others responded to this proposal by pointing out that the presence of a correlation between social deprivation and crime does not necessarily amount to a showing that any particular defendant's power of choice has become completely overborne by his or her environment.³²⁰ Morse acknowledged the causal pull of environmental factors, and conceded that some choices are made more difficult by virtue of an

³¹⁶ In Doyle's article, a California judge is quoted describing a defendant who appeared before his court. Doyle points out that "[n]o effort is made to condemn [the defendant], to weigh [his] motivations, or to consider [his] culpability. . . . The activities of [the defendant] are not presented as matters of choice; they are described as if they were *in the nature of the organisms*." Doyle, *supra* note 313, at 82 (emphasis added).

Elsewhere, Doyle suggests that media references to the defendants in the "Central Park Jogger" case as the "Central Park Wolfpack," carry implications beyond the individual offenders. *See id.* at 83. Indeed he asks, "[d]o they imply that the whole [inner city] population might someday 'revert' and go 'wilding?'" *Id.* at 84.

³¹⁷ This conclusion is inconsistent with the principle of the transfer of powerlessness. *See supra* text accompanying note 34. More importantly, it helps contribute to a state of affairs in which we may not be as troubled by the disproportionate number of racial minorities in the criminal system as might otherwise be the case.

³¹⁸ *See United States v. Alexander*, 471 F.2d 923, 957-65 (D.C. Cir. 1972), *cert denied*, 409 U.S. 1044 (1972) (Bazelon, C.J., concurring in part and dissenting in part); Bazelon, *supra* note 81 at 398-401; Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976).

³¹⁹ *See Alexander*, 471 F.2d at 961. Bazelon's opinion in *Alexander* contains a considerable degree of ambivalence regarding this theory. In his subsequent articles on the subject, however, Bazelon's claims became more forceful. *See Bazelon, supra* note 81, at 398-401.

³²⁰ *See Morse, supra* note 81, at 1248-54.

actor's social deprivation.³²¹ Nevertheless, he argued that because most poor persons are law-abiding, and because some wealthy persons also break the law, rotten social background should not be entertained as a new exculpatory factor in determining criminal responsibility.³²²

At root, the Bazelon-Morse debate is analogous to the debate contained within the various opinions in the *Moore* case.³²³ In both instances, complex human stories containing an amalgam of intentionalist and determinist elements were being considered within the context of an adjudicatory system in which individualized decisionmaking was to be employed. Further, in both debates, the exculpatory claims were rejected, at least in part, in reliance on an adjudicatory process that is capable of generating intentionalist stories while simultaneously submerging the causal account.³²⁴

When the debate is undertaken within a narrative vacuum, however, the mix of intentionalist and determinist features play out quite differently. Now, a plainly visible correlation, between race and poverty on the one hand and involvement in the criminal system on the other, is left unaccounted for. We cannot depend on the standard narrative to tell a story of free choice and individual responsibility, and we are unlikely to hear counter-narratives that assign responsibility to society generally for the link between social deprivation and race that forms a thread running through many of these cases.³²⁵

In the *Moore* case, Judge Wilkey offered a depiction in which the blameworthiness of a chemically-dependent offender's conduct is figured by reference to the relationship between his or her strength of character and his or her craving.³²⁶ As noted earlier, this depiction emphasizes the intentionalist account by treating the

³²¹ See *id.* at 1252.

³²² See *id.* at 1259. Morse's response to Bazelon contains several other arguments of a utilitarian nature, as well as the basic claim that the proposed defense would deny the offender's very personhood. See *id.* at 1261-63.

³²³ See *supra* text accompanying notes 144-80.

³²⁴ It is worth recalling that the narrow legal issue in the *Moore* case concerned the trial judge's refusal to allow expert testimony with respect to the "disease" of addiction. In a gross sense, it is plain that this ruling helped to obscure or submerge the causal account urged by the defendant, in that the jury was not allowed to hear or consider the expert's testimony regarding compulsion. See *supra* note 145 and accompanying text.

³²⁵ See generally Delgado, *supra* note 114. (discussing whether "Rotten Social Background" should be recognized).

³²⁶ See *supra* text accompanying notes 163-168.

offender's strength of character as autonomous and intrinsic.³²⁷ Similarly, it tends to submerge the causal account, despite an acceptance of the notion that craving might be a determined feature, by discounting the possibility that nonautonomous factors might also play a significant role in the development of the offender's character.³²⁸

In a system in which individualized adjudications are not always available to build an account of the offender's character out of the data of his or her conduct, it becomes tempting to infer a blameworthy character from the offender's very presence in the system. If this offender shares certain general characteristics with others in the system—especially characteristics with respect to race and class—the inference may become generalized to the whole group.³²⁹ The claim is no longer that an individual defendant has made an autonomous choice, within the context of his or her group affiliation and social environment, to engage in a course of criminal conduct; rather the claim is that the defendant must have engaged in criminal conduct because of that group affiliation and environment.³³⁰

³²⁷ This is, of course, very similar to the set of analytic moves undertaken by Frankfurt and Watson. See *supra* text accompanying notes 37-59. As noted earlier, this notion of "character" is employed by thinkers who follow the work of David Hume. According to this school of thought, conduct is understood as originating in the "regularity of one's character," and is morally significant for that reason. See Schlick, *supra* note 28.

³²⁸ See *supra* text accompanying notes 107-111.

³²⁹ Recently, a judge in Florida gave public voice to this set of inferences. While his comments led to his removal as chief judge, see *In re* Petition for Removal of a Chief Judge, 592 So. 2d 671 (Fla. 1992), they were also met with considerable support in the state. See *Florida's Top Court Demotes State Judge for Racial Remarks*, N.Y. TIMES, Jan. 19, 1992, at A16. As reproduced in the appendix to the Florida Supreme Court's opinion in the case, the judge was quoted as saying in part:

[W]hy is [it] that 20 percent of the population is black and 45 percent of the prisoners are black? That's because, goddamnit, they're the one's committing the crimes. As I told you earlier, you've got more of those folks involved in drugs than whites, as far as felonies are concerned. I don't know how many of them are using, we have no way of knowing. Every day the Times-Union reports another killing on the Northside. Every day. So they are involved in crime. That's the reason. How do we stop them from being involved in crime? We give them a mama and a daddy to start off with. We give them a home with love and affection in to start off with. But how do we go about doing that? It's impossible, if that's what they need.

Id. at 673-74.

³³⁰ The public's preoccupation with newspaper, television, and movie accounts of crime, law enforcement, and punishment has reinforced this shift in perspective. See generally Vicky Munro-Bjorklund, *Popular Cultural Images of Criminals and Prisoners*

In the end, we are left with a sort of default narrative that assigns blame neither on an individual nor on a societal basis. Significantly, both the standard narrative about individual choice and responsibility and the counter-story about societal responsibility are accounts that attach to individual offenders. The former story is about what a particular actor decided to do; the latter is about society's responsibility for maintaining the conditions that caused the actor to choose as he or she did.³³¹ By contrast, the distorted discourse that has begun to replace both of these more familiar narratives functions at the level of the group rather than the individual.³³²

Now we get accounts about "criminals" and "young hoodlums."³³³ These are accounts that assign blame and responsibility to an entire group by setting up a "we/they polarity"; by excluding "them" from "our" community altogether.³³⁴ Central to the

Since *Attica*, 18 SOCIAL JUSTICE 48 (1991). Munro-Bjorklund noted that:

Drug crimes presented as entertainment are becoming increasingly popular as publicity on the problem increases. Programs such as "48 Hours," "20/20," and other television "magazines" frequently include stories on drug crime from a variety of perspectives (law enforcement, medical involvement, youth crime). "DEA" includes dramatizations and actual drug-bust footage. While it is more exciting to watch a SWAT team break into a suspected drug house, wave around a variety of weapons, handcuff the occupants, and tear through the cupboards than it is to see an officer stop a drunk driver, both are substance-abuse crimes. The media prefer [sic] to emphasize the image of the often Black drug user/dealer than of the often white and white-collar alcohol abuser.

Id. at 64.

For a good first-person account of how generalized class and race characteristics have come to stand in for individualized judgments about a particular actor's criminality, see PATRICIA J. WILLIAMS, *The Death of the Profane*, in THE ALCHEMY OF RACE AND RIGHTS 44 (1991).

³³¹ See West, *supra* note 136, at 171, 174.

³³² Doyle refers to this process as "[a] technique of mass portrait-by-implication." Doyle *supra* note 313, at 89. The most significant feature of this distorted discourse is that a defendant of color—like all residents of the inner city—is "treated as part of the natural scene, not [as] a social being," *id.* at 72, as "a kind of undifferentiated brown stuff, about as individual as bees or coral insects," *id.* at 78 (quoting GEORGE ORWELL, *Marrakech*, in THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL, 387-88(1968)), or as "chow" for the criminal justice system, *id.* at 80 (quoting TOM WOLFE, *BONFIRE OF THE VANITIES* 39-40 (1987)).

³³³ In Williams's account, the relevant group is "17-year-old black males wearing running shoes and hooded sweatshirts." WILLIAMS, *supra* note 330 at 44. In the words of a Florida judge, "young Caucasian teachers" in the public schools "have quit because they couldn't tolerate—those hoodlums have made them quit—because they couldn't tolerate the danger. That's a fact." *In re Petition for Removal of a Chief Judge*, 592 So. 2d at 675.

³³⁴ Munro-Bjorklund, *supra* note 330, at 66-67 (discussing the media's coverage of

creation of these two distinct communities is the sense that while "we" in the larger society are morally accountable, autonomous individuals, "they" in the inner city are wholly without any moral dimension. As James Doyle puts it—"[t]hey apparently kill without reason. They apparently are not afraid of being killed. They kill their old folks; they kill their young. They have the predator's inbred love of packs."³³⁵ This is "rigidly binomial opposition of 'ours' and 'theirs.'"³³⁶ "Here, in suburbia, is ours; There, in the [inner city], is theirs. Here is normal; There is different. Here is civilized; There is primitive." ³³⁷

The larger danger in this set of developments is that the basis for desert in many cases will no longer be derived simply from what the offender has done, but also from who he or she is. Where the theory behind criminal law blaming is that individuals are called to account for their autonomous choices when those choices run afoul of communal norms, the increasing danger is that whole groups are being called to account for the "crime" of standing outside of the community, quite apart from any particular freely chosen behavior on their part.³³⁸ Where the lesson that ought to be imparted through the criminal law is supportive of an intentionalist morality, the unsettling truth is that the daily routine of processing too many criminal defendants has the potential to teach us a new lesson about the inevitability of choice given the determinist features of our fragmented society.³³⁹

the Willie Horton case during the 1988 Presidential election and stating that "[b]y using Willie Horton to symbolize the crime problem in America, Bush called up myriad conscious and unconscious fears"). *Id.* at 66.

³³⁵ Doyle, *supra* note 313, at 82.

³³⁶ *Id.* at 90 (quoting EDWARD SAID, *ORIENTALISM* 227 (1979)).

³³⁷ *Id.*

³³⁸ In a recent article Thomas Ross has made a similar claim with respect to what he terms the "rhetoric of poverty." Ross identifies a number of implicit assumptions about the inherent immorality of poor people which run throughout the Supreme Court's opinions in the welfare area. He argues that the rhetoric that pervades this case law is premised upon a view of the poor as fundamentally different from the rest of "us," and suggests that people in poverty are thought to be immoral because they are poor, while other Americans are thought to be trustworthy because they are not. See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499 (1991). To the extent that the "community" is defined by reference to a common morality, see KAI T. ERICKSON, *WAYWARD PURITANS* 9-13 (1966), this systematic differentiation of "the poor" and "the not poor" works to create two distinct communities.

³³⁹ On December 22, 1984, four young African-American men approached Bernhard Goetz on a New York subway car and demanded that he give them five dollars. The precise details of what ensued are still unclear. It is uncontroverted,

CONCLUSION

Too much should not be made of the distinction between substantive law and legal process; nevertheless, there is an apparent inconsistency in the foregoing analysis the resolution of which requires that such a distinction be drawn. Earlier, the claim was made that a loss-of-control defense for chemically-dependent defendants has been unsuccessful in the courts because its acceptance would have imposed a determinist account upon a fundamentally intentionalist system. Subsequently, the claim was made that the policy of treating drug possession, public intoxication, and the like as crimes has had a similar effect: that of undermining the criminal justice system's capacity to articulate an intentionalist ideology.

The resolution of this seeming contradiction lies in the fact that the loss-of-control defense rejected in cases like *Moore* was part of a formal legal strategy that advocated substantive reforms in the doctrine governing excuses. As we have seen, this strategy failed because of the fundamental irreconcilability of intentionalism and determinism. On the other hand, the *de facto* process of managing cases within an overloaded criminal justice system in a fashion which precludes the articulation of intentionalist narratives, coupled

however, that Goetz responded by firing a .38 revolver at the men. One of them, Darrell Cabey, was hit; his spinal cord was severed. For a good account of the Goetz case, see GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988). Although the case did not involve alcohol or drugs, it was laced with the kind of rhetoric that the current drug war has exacerbated.

Throughout Goetz's trial, his counsel proffered two related messages. The first was that the four men were somehow outside of the community of civilized citizens of New York. Thus, throughout the proceedings this lawyer referred to them as "predators", "vultures," and "savages." See *id.* at 206. The second message was that the four deserved to be assaulted at close range with an automatic pistol—indeed, one defense witness actually stated that "they got what they deserved." *Id.* at 28. These two ideas are related, and related to the larger issue raised in this article, because the *conduct* of Darrell Cabey and the others was not "deserving" of Goetz's response. Rather, the clear implication of these messages was that the four young men deserved what happened to them because of their *status*.

The defense mounted by Goetz's lawyers ultimately prevailed, and he was acquitted of all the serious charges stemming from this incident. Distressingly, that outcome met with strong support from the majority of New Yorkers. See *id.* at 199. The Goetz episode suggests that a new vision of desert, one that is fundamentally incompatible with our moral traditions, has been established in the United States. As the criminal justice system increasingly becomes a captive of the drug war, this new vision has the potential to overwhelm the foundations of our blaming practices, and to deny the essential personhood of the individual members of numerous subordinated groups.

with an overrepresentation of defendants of color, has had the quality of introducing new determinist elements into our formal blaming practices.

The irony is that while substantive doctrinal reform which posed a danger to the ideological functioning of the system was turned back in cases like *Powell* and *Moore*, an equally destabilizing phenomenon has made its way into the system as a function of enforcement strategy and procedural necessity. The ability of the criminal law to perform its institutional role in society, as a consequence, has been placed in jeopardy. Sadly, thousands of chemically-dependent offenders have also suffered as a result of this set of decisions.